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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

11 Cr. 409 (PAE)

5 STEFAN GILLIER,

6 Defendant.

7 -----x
8 New York, N.Y.
9 July 5, 2022
9:35 a.m.

10 Before:

11 HON. PAUL A. ENGELMAYER,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS,

15 United States Attorney for the
Southern District of New York

16 BY: DINA McLEOD

MICHAEL McGINNIS

17 Assistant United States Attorneys

18 LEE GINSBERG

NADJIA LIMANI

19 Attorneys for Defendant

20 ALSO PRESENT:

JANICE OVADIAH, French Interpreter

21 ERIC HEUBERGER, French Interpreter

M75CgilC

(Case called)

MS. McLEOD: Good morning, your Honor. Dina McLeod and Michael McGinnis for the government.

THE COURT: Good morning, Ms. McLeod. Good morning, Mr. McGinnis. You may be seated.

MR. GINSBERG: Good morning, your Honor. Lee Ginsberg and Nadjia Limani.

THE COURT: Good morning, Mr. Ginsberg. Good morning, Ms. Limani.

MS. LIMANI: Good morning.

THE COURT: Good morning to you, Mr. Gillier. Good morning, as well, to everyone else here. That includes two court certified French translators that I'm grateful to you for your assistance. Indeed, are there three?

THE INTERPRETER: Your Honor, Spanish interpreter assisting with the equipment.

THE COURT: Very good. Thank you.

Let me begin with the COVID rules of the road.

The current protocol is that I am at liberty to have my mask off as is anybody who is then speaking, provided that they are fully vaccinated. So, for the purposes of today, to the extent that counsel is speaking or to the extent I have a colloquy, which I expect I will have at the later point with Mr. Gillier, if that person is fully vaccinated, you may for that period of time of your speech take the mask off. When the

M75CgilC

1 time comes to trial, that same principle will apply to the
2 witness on the witness stand.

3 With that, I want to thank counsel for the really
4 thoughtful submissions you've made to me on a variety of
5 subjects, most of all, the motions in limine. Here is what I
6 intend to accomplish today, and it's a full agenda. It's my
7 hope we can get all this accomplished in an hour and a half,
8 but we'll see how things go.

9 First off, I have a lengthy bench ruling that should
10 solve all of the motions *in limine*, save that there are several
11 points of which I have follow-on questions for you. Then, in
12 no particular order, I have a series of items to take up that
13 concern *voir dire*, where it's going to be, how it's going to
14 work, who's going to be there. I have a summary of the case
15 that I want to workshop with you to make sure that it is
16 neutral and comprehensive and so forth. I want to take up our
17 trial schedule, what days we'll be sitting. I want to take up
18 issues of plea offers, if any, that have been made to
19 Mr. Gillier and allocute him on that subject. So government,
20 you need to be prepared, because I'll turn to you first when
21 the time comes, to set out what the offers were, if any, and
22 what became of them.

23 I will have some requests as to materials I need for
24 each side. Counsel, why don't you listen first and you can
25 confer in a moment. I'll have some requests for counsel as to

M75CgilC

1 materials I'll need, exhibits, 3500 and the like. I have some
2 pointers as to prior testimony to the extent it's going to be a
3 thing at this trial.

4 I want to remind counsel, I know Ms. McLeod and
5 Mr. Ginsberg have had trials before me just as to my
6 preferences with respect to the raising of issues outside the
7 trial day, and I want to take up just a couple other
8 housekeeping matters.

9 More or less, that is my agenda for today. Obviously,
10 there will be an opportunity at the end if I haven't covered
11 something for counsel to raise issues, as well.

12 Without further ado, I propose to turn first to the
13 motions *in limine*.

14 I understand the court reporter has a copy of the
15 draft.

16 I am now going to resolve, in a bench decision, the
17 motions *in limine* filed by the government and by the defense.

18 And I should say to Mr. Gillier, before I go any
19 further, if at any point you do not understand what the
20 translator is saying, please raise your hand so that I can
21 intervene. And please pull the mask up to cover your nose.
22 Thank you.

23 I will not be issuing a written decision. Instead, I
24 will simply issue an order reflecting the fact that the motions
25 were resolved for the reasons set forth on the record today.

M75CgilC

1 So, if the content of what I say is important to you, as I
2 expect in some respects it will be, you will need to order the
3 transcript of today's conference.

4 By of way of very brief background, defendant, Stefan
5 Gillier, has been charged in eight counts. One charges
6 conspiracy to commit mail and wire fraud, to transport stolen
7 property across state lines, and to engage in monetary
8 transactions in property derived from unlawful activity.
9 Gillier is also charged with one count each of mail fraud, wire
10 fraud, and interstate transportation of stolen property, and
11 three counts of engaging in monetary transactions in property
12 derived from specified unlawful activity. Trial is set to
13 begin a week from today on July 12th.

14 Broadly speaking, Gillier is alleged to have conspired
15 to defraud, first, Honeywell and, later, other victims of
16 millions of dollars in aircraft parts through a stopped-check
17 scheme. Although the substantive fraud counts cover only the
18 first part of the scheme, the conspiracy is alleged to have
19 spanned the period of 2004 through 2010. The scheme is alleged
20 to have occurred in two phases.

21 The first spanned 2004 through 2006. The government
22 alleges that in 2004, Gillier, as president of RTF
23 International Inc., which I will call "RTF," and using the
24 alias "Roland Van Gorp," began placing airplane part orders
25 with Honeywell. Between 2004 and 2006, RTF ordered and

M75CgilC

1 received more than \$6 million in airplane parts from Honeywell.
2 Gillier, the sole signatory of the accounts from which payment
3 was sent to Honeywell, is alleged to have stopped payment on
4 more than 400 of the nearly 1,000 checks sent, enabling him, in
5 effect, to steal more than \$6 million in airplane parts.

6 Because RTF obtained Honeywell parts without paying for them,
7 the government alleges, it was able to sell the products for
8 below-market value while still recording a profit. RTF then
9 transferred the profits from parts sold to accounts controlled
10 by Gillier and his coconspirator, Rafii Tari, who is, today,
11 deceased.

12 According to the government, Honeywell did not detect
13 the stop-payment scheme until in or around March 2006, when it
14 began investigating RTF and a man using the name "Roland Van
15 Gorp." After Honeywell placed a credit hold on RTF's account,
16 Gillier attempted to set up a credit line using another entity
17 he controlled, Alberta Aerospace Services, "AAS," which Gillier
18 allegedly falsely represented had done more than \$11 million in
19 sales. But Honeywell identified an apparent connection between
20 AAS and RTF and did not ship any parts to AAS.

21 On June 14, 2006, Honeywell executed a civil
22 attachment order at a warehouse and Gillier's residence in
23 Kansas. The next day, June 15, 2006, Gillier left the United
24 States for Canada. He did not return to the United States
25 willingly. He was extradited from Italy in 2020.

M75CgilC

1 Honeywell commenced civil litigation against Gillier
2 soon after executing its civil attachment order in 2006.
3 Gillier failed to appear in connection with that litigation –
4 in his individual and corporate capacities – for noticed
5 depositions on four occasions.

6 The second phase of the alleged scheme occurred
7 between in our about May 2006 through 2010. On or about
8 July 7, 2006, Gillier's coconspirator, Tari, is alleged to have
9 incorporated a company called UN Air Service, Inc., or "UAS,"
10 in Delaware. The government alleges that UAS perpetrated, in
11 substance, the same aircraft part stop-payment scheme as RTF.
12 UAS used Tari's address at Trump Tower as a shipping and
13 billing address through at least May 2008.

14 The government proffers that Gillier took part in the
15 second phase in at least the following ways: Gillier and his
16 alias "Roland Van Gorp" had both been listed as personal
17 references in support of Tari's lease application for the Trump
18 Tower address; checks drawn from RTF's account had been
19 remitted for the first and last month's rent; and in 2007 and
20 2008, UAS shipped seven different packages to Gillier at his
21 address in Montreal.

22 With that, I will turn to the motions *in limine*. I'll
23 address the government's first, and indicate where Gillier has
24 filed a similar motion, and resolve those together. I'll then
25 address Gillier's remaining motions *in limine*.

M75CgilC

1 I'll first address the government's motion relating to
2 statements made by Gillier's counsel during the Kansas
3 litigation. The government seeks to admit statements Gillier's
4 lawyers made on his behalf in answers to Honeywell's requests
5 for admission and in an answer to Honeywell's amended petition.
6 Gillier does not object to the receipt of the specific
7 statements identified by the government. However, he objects
8 to the "wholesale offering by the government of exhibits 301-A
9 through 302-F2, 699 pages of court filings, the majority of
10 which do not contain 'admissions.'"

11 The Court rules for the government and grants this
12 motion, with the important caveat that I understand the
13 government to be offering only the specific statements it has
14 enumerated and not any unspecified others. Because Gillier
15 does not object to the admission of the particular statements
16 the government has identified, the government's motion, as thus
17 construed, is effectively unopposed. Those statements are
18 properly admitted under Federal Rule of Evidence 801(d)(2)(D).
19 It provides that statements "made by the defendant's agent or
20 employee on a matter within the scope of that relationship and
21 while it existed" are not hearsay. It is well established that
22 statements of an attorney made on behalf of a client are not
23 hearsay, under that rule, when admitted in a later criminal
24 trial against that client. See *United States v. Amato*, 356
25 F.3d 216, 220 (2d Cir. 2004), which affirmed the admission of a

M75CgilC

1 letter from the defendant's prior counsel. *United States v.*
2 *Arrington*, 867 F.2d 122, 128 (2d Cir. 1989), which held that
3 there are no "special procedures to be followed, or balancings
4 to be formed as a prerequisite to the evidentiary use of a
5 defendant's counsel's out-of-court statements." *United States*
6 *v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984), which recognized
7 that "the general admissibility of an attorney's
8 statements... is well established."); and *United States v.*
9 *Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981), which held that
10 "statements made by an attorney concerning a matter within his
11 employment may be admissible against the party retaining the
12 attorney.")

13 My ruling – by necessity – reaches only the admission
14 the government has identified on pages 11 through 13 of its
15 motion *in limine*. These include statements such as "the
16 Honeywell product identified in the inventory [of airplane
17 parts recovered in the civil search and seizure of Gillier's
18 Kansas warehouse] was received and accepted by RTF" and "Roland
19 Gillier is employed by RTF" and "Roland Van Gorp and Roland
20 Gillier are one in the same person." The defense, rightly,
21 does not object to these statements under Rule 801(d)(2)(D),
22 and the Court does not understand the defense to dispute
23 admissibility on any other ground, such as authentication or
24 Rules 401, 402, and 403. Nor, on the Court's review, would
25 there be any apparent basis for such an objection. To the

M75CgilC

1 extent the defense objects, it is to the spectre that the
2 government would make a "wholesale offering" of 699 pages of
3 court filings. Such would be obviously problematic without a
4 tailored examination of specific statements therein, not just
5 to confirm compliance with Rule 801(d)(2)(D), but Rules 401
6 through 403. But the government, I understand, is not seeking
7 that. If I am wrong about that, the government is to alert me
8 following this conference, but the remedy will be to identify
9 additional counseled statements that the government seeks to
10 admit.

11 I'll turn next to evidence of conduct by Gillier's
12 that constitutes what the government terms his "flight" after
13 execution of Honeywell's attachment order, and his later
14 refusal to attend depositions in the United States. The
15 government seeks to introduce such evidence as probative of
16 Gillier's consciousness of guilt. Gillier argues that the
17 government has not met its burden with respect to such
18 evidence.

19 At the outset, I'll distinguish between the categories
20 of evidence that are contested here. The first is paradigmatic
21 "flight" evidence: That Gillier left the United States the day
22 after he was served with a civil attachment order that, in
23 substance, accused him of stealing from Honeywell. The second
24 is Gillier's later failure to return to this country for four
25 noticed depositions in civil litigation that related to the

M75CgilC

1 Honeywell scheme. I'll take each in turn after briefly
2 recounting the legal standards governing the admissibility of
3 flight evidence.

4 As the Second Circuit, per then Judge and future
5 Justice Thurgood Marshall recognized back in 1962, "evidence of
6 flight generally is admissible as is other circumstantial
7 evidence. It is not conclusive, but is subject to varying
8 interpretations. The accepted technique is for the judge to
9 receive the evidence and permit the defendant to bring in
10 evidence in denial or explanation." *United States v. Ayala*,
11 307 F.2d 574, 576 (2d Cir. 1962). The circuit has since held
12 that "probative value [of flight] as circumstantial evidence of
13 guilt depends upon the degree of confidence with which four
14 inferences can be drawn: (1) from the defendant's behavior to
15 flight; (2) from flight to consciousness of guilt; (3) from
16 consciousness of guilt to consciousness of guilt concerning the
17 crime charged; and (4) from consciousness of guilt concerning
18 the crime charged to actual guilt of the crime charged."
19 *United States v. Al-Sadawi*, 432 F.3d 419, 424 (2d Cir. 2005)
20 (internal quotations removed). These requirements, the circuit
21 has stated, "ensure that the evidence is probative in a legal
22 sense and protects the defendant against the possibility of the
23 jury drawing unsupported inferences from otherwise innocuous
24 behavior." *United States v. Torres*, 435 F.Supp.3d 526, 537-38
25 (S.D.N.Y. 2020) (internal quotations removed).

M75CgilC

1 Turning to the matters at issue, the four inferences
2 identified by the circuit can easily be drawn from the evidence
3 the government proffers of Gillier's flight from the United
4 States in June 2006. The government proffers that it will show
5 that Gillier flew to Canada on June 15 – literally one day
6 after he witnessed the execution of the civil attachment order
7 at his Kansas warehouse and personal residence – and that he
8 did not return to the U.S. until he was extradited here in
9 2020. See *Al-Sadawi*, 432 F.3d at 425, holding that "evidence
10 that a defendant fled immediately after a crime was committed
11 supports an inference that the flight was motivated by a
12 consciousness of guilt of that crime. As the time between the
13 commission of the offense and the flight grows longer, the
14 inference grows weaker." Critically, too, the civil attachment
15 order here and ensuing civil litigation – on the government's
16 theory – targeted Gillier's two-year long scam of Honeywell. A
17 jury could easily find that Gillier would have understood this
18 dramatic action as a likely prelude to a criminal action
19 against him based on the same alleged scam. In other words, a
20 jury could easily find that, based on Honeywell's attachment of
21 this property, Gillier knew the jig was up.

22 Gillier makes two arguments in response. First, based
23 on a more benign explanation for his actions, he contends that
24 these did not bespeak consciousness of guilt. As Gillier
25 explains, he had "no choice" but to leave the U.S. after his

M75CgilC

1 car, warehouse, and possessions were seized. But whether
2 Gillier truly had "no choice" but to leave the country, and
3 whether that as opposed to fear of apprehension and ensuing
4 conviction drove his departure is an issue for the jury. And
5 the government has an available factual counterargument: It
6 proffers that Gillier, far from having nowhere to go in the
7 U.S., maintained an address in New York. As the Second Circuit
8 has held: "Absent unusual circumstances, what inferences are
9 suggested, or conclusively established, by the evidence are
10 matters to be argued to the jury by counsel." *United States v.*
11 *Mundy*, 539 F.3d 154, 157 (2d Cir. 2008); see also *United States*
12 *v. Steele*, 390 F.App'x 6, 11 (2d Cir. 2010). The circuit held
13 there that it was not an abuse of discretion to receive
14 evidence of flight where defendant proffered an alternative
15 explanation for his conduct and was permitted to offer that
16 explanation to the jury. Based on the government's proffer, a
17 reasonable jury could easily infer consciousness of guilt based
18 on the suggestive timing and circumstances of Gillier's
19 departure. At trial, Gillier will be at liberty to argue a
20 different, and more benign, interpretation of these events.

21 Gillier also notes that "there were no criminal
22 charges against Mr. Gillier on June 14, 2006." That, however,
23 is not decisive. The relevant timeframe, the circuit has held,
24 is the "time between the commission of the offense and the
25 flight." *United States v. Al-Sadawi*, 432 F.3d 419, 424

M75CgilC

1 (2d Cir. 2005). Given that Honeywell's civil litigation
2 targeted an allegedly unknowing fraud, a jury could reasonably
3 infer that its court-approved attachments would have signaled
4 to Gillier that a follow-on criminal action was forthcoming.

5 I'll briefly address two collateral issues implicated
6 by the government's flight evidence. First, there is a
7 potential hearsay problem posed by receiving the content of the
8 civil attachment order in evidence, as such effectively accuses
9 Gillier of the crime for which he will stand trial in this
10 court. To cure that problem, the government states that it
11 will not offer the content of Honeywell's attachment papers for
12 their truth. That is the right solution. On a request from
13 the defense, I stand at the ready to give the jury a limiting
14 instruction that the content of the civil attachment order and
15 associated papers is admissible to show only the effect of that
16 order on Gillier's knowledge and intent and to explain his
17 ensuing conduct.

18 Second, Gillier asserts that, after the execution of
19 the civil attachment order on June 14, 2006, he flew from
20 Kansas to New York to meet with attorneys to discuss matters
21 including "the civil cases brought against him by Honeywell."
22 On the facts proffered, that meeting is clearly inadmissible.
23 As the government notes, the bare fact that Gillier met with a
24 lawyer could only be offered in an attempt to imply that
25 Gillier's New York counsel authorized some aspect of his

M75CgilC

1 behavior, presumably his ensuing flight, and to pull the sting
2 of that flight as evidence of consciousness of guilt. But
3 receiving the fact of such a meeting would allow the defense to
4 end-run the established obligations with respect to
5 advice-of-counsel evidence. And Gillier, despite a proper
6 request from the government, has not disclosed an intent to
7 give an advice-of-counsel defense, either as to the schemes
8 alleged or the discrete act of flight.

9 Courts in this district have been reluctant to permit
10 the defense to pursue a "presence-of-counsel" defense without
11 requiring the defendant to meet the criteria necessary to mount
12 an advice-of-counsel-defense. *See, e.g., SEC v. Tourre*, 950
13 F.Supp.2d 666, 683-84 (S.D.N.Y. 2013); *SEC v. Lek Securities*
14 *Corp.*, 2019 WL 5703944, at *4 (S.D.N.Y. Nov. 5, 2019). Apart
15 from permitting a defendant to benefit from an incomplete
16 advice-of-counsel defense, a presence-of-counsel defense may
17 also be highly misleading to a jury. That is because the mere
18 presence of counsel is not probative of anything. It does not
19 establish what was said between client and counsel. And, where
20 there is not evidence that all relevant information was
21 disclosed to counsel and that counsel's ensuing advice was
22 followed, it cannot establish the defendant's good-faith
23 reliance on the advice of counsel. *See SEC v. Stoker*, 11 Civ.
24 7388 (JSR) (S.D.N.Y. 2012), Dkt. 100 at 895-96, where Judge
25 Rakoff recognized that "absent evidence that counsel knew

M75CgilC

1 either the information that Mr. Stoker allegedly kept secret,
2 at least from outsiders, or knew the information that the SEC
3 claims were distorted misrepresentations, the role of counsel
4 in any of this was totally irrelevant." As Judge Forrest
5 explained in *SEC v. Tourre*, the risk of prejudice in
6 introducing "presence-of-counsel" evidence is that "a lay jury
7 could easily believe that the fact that a lawyer is
8 present... means that he or she must have implicitly or
9 explicitly "blessed" the legality of [the act in question]."
10 950 F.Supp.2d at 683-84.

11 That concern would be squarely implicated here were
12 Gillier permitted to offer the fact of his meeting with an
13 attorney. Introducing evidence that Gillier met with an
14 attorney right after his business and personal property were
15 attached could – without more – suggest to the jury that his
16 counsel blessed his subsequent conduct, the flight, and/or
17 perhaps his prior conduct toward Honeywell. But Gillier has
18 not proposed to offer admissible evidence of the foundation of
19 any such advice-of-counsel defense. Such would require Gillier
20 to show "that he: (1) honestly and in good faith sought the
21 advice of counsel; (2) fully and honestly laid all the facts
22 before his counsel; and (3) in good faith and honestly followed
23 counsel's advice, believing it to be correct and intending that
24 his acts be lawful." *United States v. Colasuonno*, 697 F.3d
25 164, 181 (2d Cir. 2012). There has been no defense proffer

M75CgilC

1 whatsoever as to what Gillier informed his counsel, what
2 information was available to counsel, what advice counsel
3 thereupon gave Gillier, when these interactions occurred, or
4 even who the counsel were that purportedly gave Gillier
5 pertinent advice. For all we know, the meeting Gillier had
6 with an attorney on the eve of his flight did not concern legal
7 matters at all, or if it concerned legal matters, ones relating
8 to this case at all. For all we know, it involved estate
9 planning or flight insurance. Accordingly, the Court excludes
10 evidence that Gillier met with his counsel before leaving the
11 United States. I do so under the case authority above and
12 under Rules 401 through 403. There is no non-speculative
13 probative value to Gillier's meeting with an attorney, and even
14 if there were, the meeting has clear and substantial potential
15 to confuse and mislead the jury, and to unfairly prejudice the
16 government.

17 I'll turn now to the government's motion as it relates
18 to evidence of Gillier's failure to appear for four noticed
19 depositions in the Honeywell civil litigation. The government
20 seeks to introduce such evidence to show that Gillier's
21 "behavior went beyond merely choosing not to return, as he
22 repeatedly defied his legal obligation to return to the United
23 States and appear for depositions in the Kansas litigation on
24 four separate occasions." Gillier's civil counsel, in legal
25 filings, described the depositions as functionally "an attempt

M75CgilC

1 to extradite him to the United States, and propounded
2 interrogatories to Honeywell seeking to ascertain whether, and
3 to what extent, Honeywell had made any criminal referrals to
4 U.S. law enforcement regarding Gillier and his scheme." The
5 government seeks leave to introduce evidence relating to
6 Gillier's conduct and these representative admissions to
7 establish Gillier's consciousness of guilt.

8 I begin with the guidance of the Second Circuit.
9 "When there is an adequate factual predicate that a defendant
10 remained a fugitive because of a guilty conscience, his
11 continued absence is probative in much the same way as his
12 initial flight." *Amuso*, 21 F.3d at 1260. The government here
13 contends that Gillier's continued absence – particularly in the
14 context of noticed depositions and statements from his counsel
15 indicating his awareness of potential criminal proceedings –
16 supplies such a factual predicate. I find that persuasive. A
17 jury could easily infer, from Gillier's continued absence,
18 including his failure to return to the U.S. for four
19 depositions, that such behavior evinced consciousness of guilt.
20 See *United States v. Candelaria-Silva*, 162 F.3d 698, 705
21 (1st Cir. 1998), in which the First Circuit found that the
22 district court did not abuse its discretion in admitting
23 evidence of flight and continued absence because there was an
24 adequate factual predicate, including that defendant admitted
25 "after his arrest that he knew he was wanted in Puerto Rico."

M75CgilC

1 As with the evidence of Gillier's departure, Gillier's counsel
2 is at liberty to argue a different interpretation of the
3 evidence to the jury.

4 I also note that the receipt of evidence that Gillier
5 refused to appear for depositions does not infringe his Fifth
6 Amendment right against selfincrimination. And that's not an
7 argument the defense has made, I'm merely spotting it. In this
8 respect, it is different from allowing the jury to hear that a
9 defendant invoked his Fifth Amendment right against
10 selfincrimination during a civil deposition. *See Universitas*
11 *Educ., LLC v. Nova Grp., Inc.*, 2016 WL 1178773, at *4 (S.D.N.Y.
12 Mar. 23, 2016), which held that "the general reasonableness of
13 a fear of potential selfincrimination does not justify a
14 refusal to answer any and all questions. The appropriateness
15 of assertions of privilege must be determined on a
16 question-by-question basis." *See also Auction Credit*
17 *Enterprises, LLC v. Lo Castro*, 2010 WL 3039180, at *2 (W.D. Pa
18 July 30, 2010), holding that "defendant's refusal to submit to
19 any examination by properly noticed or subpoenaed deposition is
20 not a valid exercise of the Fifth Amendment privilege against
21 selfincrimination."

22 The Court therefore will permit the jury to hear
23 evidence that Gillier, on multiple occasions, failed to appear
24 for noticed depositions.

25 Relatedly, Gillier seeks to preclude evidence

M75CgilC

1 regarding his use of an allegedly bogus claim of a medical
2 illness as a basis not to appear at a deposition in the
3 Honeywell litigation. Gillier is concerned that the
4 government, on its direct case, will offer evidence that a
5 doctor retained by Honeywell, Dr. Michael Monaco, analyzed
6 Gillier's medical records and concluded that "there was a high
7 probability of suspicion for surreptitious use of a drug to
8 induce a low sugar condition that would preclude [Gillier's]
9 being able to travel out of the country at that time." Had the
10 government pursued that route, it would have raised questions,
11 including the nonhearsay means by which it intended to prove up
12 Gillier's alleged manipulation of his blood sugar prior to the
13 scheduled deposition. It also would have raised a question
14 about whether this Dr. Monaco had any medical foundation to
15 reach those conclusions. In all events, the government has not
16 stated that it intends to offer such proof, as opposed to
17 offering the fact that Gillier did not attend the deposition.
18 I therefore assume that the government is not seeking to put
19 before the jury Gillier's ostensible manipulation of his
20 medical condition on his direct case. If that is wrong, the
21 government is to notify the Court immediately after this bench
22 ruling. That, of course, does not preclude the government from
23 seeking to elicit such evidence should Gillier open the door to
24 it at trial, for example, suggesting that he had a valid
25 medical reason not to enter the United States. Nor does it

M75CgilC

1 preclude the government from taking up this issue on cross
2 examination should Gillier testify. Before raising the issue
3 before the jury, however, the government is to notify the Court
4 outside the jury's presence.

5 The government next seeks to introduce certain
6 statements Gillier made when he was refused entry to the United
7 States on three occasions: In December 2004, February 2005,
8 and December 2005. These, of course, were prior to the
9 Honeywell attachment that the government contends occasioned
10 his flight in 2006.

11 During the December 2005 attempted entry, the border
12 agent determined that Gillier was required to possess a valid
13 visa to enter the United States because he determined that
14 there was strong evidence that Gillier lived and worked in the
15 United States. As part of that inspection, the agent took a
16 sworn statement in which the government contends Gillier made
17 false representations, such as that the purpose of his entry
18 was to "relax for a couple of days" and that he had "no
19 position at RTF International." The government seeks to
20 introduce these statements as direct evidence to show, in
21 particular, that Gillier acted to conceal the ongoing
22 conspiracy, and that Gillier's lies to gain reentry into the
23 United States were in furtherance of the conspiracy, i.e., to
24 allow him to enter the United States to continue fraudulent
25 activity at RTF.

M75CgilC

1 The defense does not object to the admission of these
2 statements. Gillier objects only to the extent that either the
3 CBP's agent's questions, or Gillier's answers, involved an
4 investigation by any U.S. agency for transshipping to Iran.
5 Relatedly, Gillier has also filed a motion *in limine* requesting
6 that the Court order that the government redact any statements
7 that are not relevant to Gillier's charges.

8 On this issue, I am persuaded by Gillier, whose
9 motion, in pertinent part, is unopposed. As the defense
10 rightly notes, evidence relating to any investigation of
11 Gillier relating to potential ITAR violations would have
12 considerable potential for unfair prejudice, and such evidence
13 would not be relevant to the fraud charges in this case. As
14 such, such evidence is properly excluded under both Rules of
15 Evidence 401 and 403. The government does not take a different
16 view. In its opposition to Gillier's motions *in limine*, the
17 government states that it does not object to redacting the
18 question and answer relating to whether Gillier was under
19 investigation for transshipping to Iran.

20 Accordingly, the government will be permitted to
21 introduce statements Gillier made at the border, provided that
22 it redact any statements involving any investigation into
23 Gillier into ITAR violations or other infractions unrelated to
24 the crimes alleged here.

25 The next motion involves the seized Kansas computer.

M75CgilC

1 In its motion, the government states "absent a stipulation that
2 a particular computer seized during the June 14th, 2006 civil
3 search in Kansas was used by and belonged to Gillier alone, the
4 government intends to introduce the fact that pornography was
5 on that computer within a folder bearing Gillier's name." Gov.
6 Mot. at 20. In his opposition, Gillier has agreed to so
7 stipulate. See Gillier Opp. at 5. That moots the issue. For
8 avoidance of doubt, upon such a stipulation, there is to be no
9 reference to the pornographic nature of any material on the
10 Kansas computer.

11 I'll now consider together two motions *in limine*, one
12 from the government and one from Gillier. Each relates to
13 post-2006 evidence.

14 I'll consider Gillier's first, as it sweeps more
15 broadly. Gillier seeks to preclude evidence of any post-2006
16 activity by UAS and AAS. He argues that such is not direct
17 evidence and cannot be linked to him. Consistent with that
18 position, Gillier argues that any evidence regarding victims
19 other than Honeywell, including *inter alia*, Pratt & Whitney,
20 Dallas Airmotive, and Twin Aviation, cannot be considered
21 direct evidence of a charged crime because such victims, as
22 alleged, were targeted only after he left the country in 2006.
23 Gillier is wrong.

24 At the outset, as the government notes, Gillier's
25 argument that evidence post-dating 2006 cannot serve as direct

M75CgilC

1 evidence of a charged crime misreads the indictment. Count
2 One, the conspiracy count, explicitly charges a conspiracy
3 spanning 2004 through 2010. It alleges that Gillier and Tari
4 conspired to "defraud aircraft part manufacturers," plural,
5 paragraph 6., meaning manufacturers, plural. And it alleges
6 that the scheme continued until 2010 – years after Honeywell
7 alerted to the alleged fraud, in 2006, and took the civil
8 actions that allegedly prompted Gillier's flight. The
9 conspiracy count expressly covers the second phase of the
10 conspiracy when Tari and Gillier were operating under the
11 entity of UAS between 2006 and 2010, and pivoted to attempt to
12 defraud entities other than Honeywell.

13 Now, Gillier posits that the government will not be
14 able to link him to the post-2006 conduct – involving victims
15 other than Honeywell, and through the UAS entity. That will
16 await proof at trial. For present purposes, what matters is
17 that the indictment charges Gillier with participation in a
18 conspiracy to defraud manufacturers that extends through 2010,
19 and as such, evidence of such a conspiracy is properly received
20 as direct evidence. In any event, the government proffers that
21 it will adduce evidence that Gillier and Tari continued
22 effectively the same scheme after 2006, albeit with
23 modifications. The corporate entity they used, UAS, was new;
24 and the aircraft parts were purchased from different
25 manufacturers, including Pratt & Whitney, among others; and the

M75CgilC

1 steps in furtherance taken by individual conspirators
2 presumably adapted given Gillier's domicil abroad. The
3 government proffers that it will offer evidence directly
4 linking Gillier to the scheme as continued. As proffered,
5 these include leasing documents and financial records showing
6 that Gillier assisted UAS in obtaining its office lease and
7 paying for its rent. In addition, the government anticipates
8 introducing evidence that, in 2007 and 2008, UAS shipped
9 multiple packages to Gillier at his Montreal home. Such
10 evidence is direct evidence of Gillier's involvement in the
11 second phase of the conspiracy. Subject to the theoretical
12 possibility that this evidence will not be properly
13 authenticated, or that considerations will emerge that make
14 such proof inadmissible under Rule 403, and to date no proffer
15 along these lines has been admitted, such proof will be
16 received.

17 There is, however, a caveat, which I will take up
18 before moving to the government's motion to introduce
19 coconspirator statements. The conspiracy charge that I have
20 just referenced alleges that the "scheme so defraud" spanned
21 between "at least in or about 2004, up through and including on
22 or about March 1, 2010." See paragraph 6 of the indictment.
23 As such, the post-2006 evidence of a fraud conspiracy can and
24 will, as I've explained, be received as direct evidence for
25 that charged offense. I note, however, that the substantive

M75CgilC

1 offenses do not extend that far in time. The mail fraud, wire
2 fried, ITSP, and money laundering offenses, as alleged,
3 occurred between "in or about 2004 up to and including in or
4 about June 2006." That's paragraphs 17 and 19 for the former
5 two, and May and June 2006 for the latter two, that's
6 paragraphs 21 and 23. Were this case limited to substantive
7 charges, and were there no conspiracy charge, the defense would
8 have a strong argument that evidence of post-2006 conduct could
9 not be received as direct evidence, but only under Rule 404(b)
10 if it met the requirements of Rule 404(b). The defense
11 therefore may be entitled, should it regard it as worthwhile,
12 to a limiting instruction identifying the discrete purposes for
13 which post-2006 or post mid-2006 evidence may be received as to
14 the substantive counts, Counts Two through Eight, even though
15 no such limiting instruction would be in order for the
16 conspiracy count, Count One. It may be that the defense would
17 not at all welcome that articulation by the Court to the jury.
18 For now, I'll just flag the issue for defense counsel.
19 Mr. Ginsberg, if I don't receive an application from you along
20 these lines, I will not plan on give a limiting instruction as
21 to the evidence of post-2006 conduct. The ball, in other
22 words, is in your court.

23 I'll turn now to the government's motion *in limine* to
24 introduce coconspirator statements made by UAS and AAS
25 employees.

M75CgilC

1 The governing principles as to the admissibility of
2 coconspirator statements are familiar. Rule 801(d)(2)(E)
3 provides in relevant part that a "statement is not hearsay
4 if... the statement is offered against an opposing party and
5 was made by the party's coconspirator during and in furtherance
6 of the conspiracy." As the Second Circuit and Supreme Court
7 have held, to admit a statement under this rule, a district
8 court must find two facts by a preponderance of the evidence.
9 First, that a conspiracy that included the defendant and a
10 declarant existed; and second, that the statement was made
11 during the course of and in furtherance of that conspiracy.
12 Citing the famous case of *Bourjaily v. United States*, 483 U.S.
13 171, 175 (1987); *United States v. Gigante*, 166 F.3d 75, 82
14 (2d Cir. 1999). As the Second Circuit has explained, the
15 requirement that the challenged statement be in furtherance of
16 the conspiracy is satisfied if the statement's objective is
17 "designed to promote or facilitate achievement of the goals of
18 the conspiracy." *United States v. Rivera*, 22 F.3d 430, 436
19 (2d Cir. 1994). The circuit has summarized in the following
20 manner some of the ways in which a conspirator statement may
21 further a conspiracy:

22 A statement must be more than a merely narrative
23 description by one coconspirator of the acts of another.
24 Statements in furtherance of a conspiracy prompt the listener
25 to respond in a way that promotes or facilitates the carrying

M75CgilC

1 out of criminal activity. The statements need not be commands,
2 but are admissible if they provide reassurance, or seek to
3 induce a coconspirator's assistance, or serve to foster trust
4 and cohesiveness, or inform each other as to the progress or
5 status of the conspiracy. *United States v. Desena*, 260 F.3d
6 150, 158 (2d Cir. 2001).

7 Here, the government seeks to introduce, through
8 documents and records, various out-of-court statements made by
9 individuals allegedly connected with UAS and AAS. The
10 government illustrates two such statements in its motion.

11 The government proffers that UAS employees made
12 numerous false statements to a Pratt & Whitney employee – I'll
13 call that P&W employee 1 – to conceal the fraud and to induce
14 Pratt & Whitney to continue to ship parts to UAS. For example,
15 a UAS employee – whom I'll call UAS employee 1 – falsely told
16 P&W employee 1 that UAS had wired payments to Pratt & Whitney
17 to cover the invoices on which payment was stopped. UAS
18 employee 1 asked whether Pratt & Whitney could now ship UAS
19 additional parts. P&W employee 1 responded that no shipments
20 would occur until the payments cleared. UAS employee 1 later
21 sent P&W employee 1 an email purportedly containing details of
22 the wire transfers, but which instead contained only Pratt &
23 Whitney's bank account information. When P&W employee 1
24 pointed out the lack of an actual wire transfer confirmation,
25 UAS employee 1 falsely stated that she was working with the

M75CgilC

1 bank to get the wire transfer information to Pratt & Whitney.
2 UAS employee 1 later falsely claimed that UAS's bank had
3 confirmed that it had sent the wire to the wrong bank account
4 and that the bank was in the process of recovering the funds.
5 No wire transfers were ever made to cover the unpaid invoices.

6 As another example, an employee of AAS – which had
7 submitted a credit application to Honeywell, signed by AAS
8 employee Harrison Mirtar, shortly after Honeywell ceased
9 shipments to RTF – called a Honeywell customer service
10 representative several times to inquire as to the status of
11 that credit application. The AAS employee identified himself
12 as "Tristan Anderson." But when asked for his complete name,
13 he stated, "I am Tristan, but the direct number is for
14 Harrison."

15 I will resolve these motions using these illustrative
16 examples. I will rule, to the extent possible at this pretrial
17 juncture, based on the evidence that has been proffered. In
18 ruling, I am assuming that the government's factual proffers
19 accurately reflect what the evidence will show. If that
20 premise is wrong, of course, or if counsel believe that actual
21 evidence is afield from that previewed, my ruling today has no
22 bearing. If counsel believe a coconspirator statement being
23 offered is outside the scope of what I'm now addressing,
24 counsel should, by all means, object so as to assure a timely
25 and informed ruling. I'm also assuming that, as of the point

M75CgilC

1 any statement by an alleged coconspirator is offered at trial
2 as a statement in furtherance of the conspiracy, the Court will
3 have received, or the government will have proffered, evidence
4 supporting the first *Bourjaily* requirement, that is that a
5 conspiracy existed and that it included the defendant and the
6 declarant.

7 The issue then as to each statement would be twofold.
8 First, does it qualify as one in furtherance of the conspiracy?
9 And second, if so, as with all evidence, does the statement
10 meet the requirements of Rules 402 and 403? Is it probative of
11 an element of the offense? And if so, is its probative value
12 substantially outweighed by the risk of confusion, delay, or
13 unfair prejudice?

14 The government's first example, again, involves an
15 ostensible attempt to compel the shipment of aircraft parts
16 from Pratt & Whitney to UAS without having paid for them. The
17 government expects to introduce this attempt through
18 documentary and record evidence containing the above-mentioned
19 statements. The statement as described can reasonably be
20 inferred to have been by a coconspirator in furtherance of the
21 conspiracy's fraud object. That's because the statement served
22 to induce Pratt & Whitney to continue shipping aircraft parts,
23 for which UAS had no intention to pay. Viewed in terms of
24 Rules 402 and 403, this kind of statement is probative of the
25 allegations against Gillier for taking part in the alleged

M75CgilC

1 stop-payment conspiracy. And although it may be harmful to
2 Gillier's trial prospects, that is not unfair prejudice.
3 Rather, it is harmful because of its capacity to prove up an
4 element of the offense – the charged conspiracy and its
5 functional means of operating. Accordingly, statements such as
6 these have substantial probative value and there are not
7 consequential offsetting factors under Rule 403. Such
8 statements are admissible.

9 The government's second example concerns statements
10 made by an AAS employee when he called the Honeywell customer
11 service rep to inquire as to the status of that credit
12 application. In his opposition, Gillier states that he does
13 not contest that statements made by Harrison Mirtar or any
14 other AAS employees may be admissible as coconspirator
15 statements, but he reserves the right to make any objection to
16 the introduction of such evidence. This statement, too, could
17 reasonably be found to have been made by a coconspirator in
18 furtherance of the alleged conspiracy. The statements were
19 aimed at securing a new line of credit with Honeywell that
20 would permit the coconspirators to continue the scheme to
21 defraud. Again, as to Rule 403, this kind of statement is
22 probative of the conspiracy charge in Count One. And for the
23 same reason above, it may be damaging evidence, but it's not
24 unfairly prejudicial. Accordingly, this statement, too, is
25 admissible.

M75CgilC

1 The Court therefore grants the government's motion *in*
2 *limine* to admit these statements under Rule 801(d)(2)(E) and
3 any similar statements that would qualify under that hearsay
4 exclusion.

5 I will, however, caveat this ruling by noting that the
6 government has not identified in its motion *in limine* the
7 precise nature of the documentary and record evidence and the
8 method by which it seeks to introduce these coconspirator
9 statements. They are described generally in the motion *in*
10 *limine*, but not with precision. It is not as clear to me as I
11 would like the nature of proof that will be received to link
12 AAS and UAS to the conspiracy, although I understand the
13 government's proffer that there is such proof. In the interest
14 of confirming that that aspect of the *Bourjaily* foundation has
15 been laid, counsel for the government should be prepared, at
16 the end of my ruling or, if not, prepared today in writing
17 thereafter to identify with more specificity what the documents
18 and records will be that prove up the existence of the
19 conspiracy and the participant of these corporate entities in
20 it.

21 The government seeks to preclude evidence or argument
22 that seeks to blame Honeywell and other victims for Gillier's
23 fraud scheme; evidence concerning Gillier's family background,
24 health condition, age, or any other personal factors; and
25 evidence or argument concerning Gillier's commission of "good

M75CgilC

1 acts" or non-commission of other bad acts.

2 I grant the government's motions for several reasons.
3 First, they are each unopposed. That alone would justify
4 granting the motions.

5 As to evidence that Honeywell or any other victim was
6 negligent in failing to alert or to stop the alleged fraud,
7 that is properly precluded. A defendant charged with a fraud
8 scheme may not assert as a defense the victim's negligent
9 failure to discover the fraud. *United States v. Thomas*, 377
10 F.3d 232, 243-44 (2d Cir. 2004). Whether Honeywell or the
11 other victims were negligent in extending RTF and UAS credit,
12 monitoring its finances, or failing to discover Gillier's
13 alleged misconduct is irrelevant to the charges at issue, and
14 to the jury's determination of Gillier's culpability of the
15 crimes charged pursuant to the legal standards, familiar ones,
16 on which I will instruct them. Accordingly, the Court will
17 preclude any evidence or line of argument that Honeywell or the
18 other manufacturers were negligent.

19 The government has also moved to preclude evidence or
20 argument concerning the defendant's health, family background,
21 age, education, or other such personal information on the
22 grounds that such biographical details are irrelevant, that
23 they are apt to confuse or distract the jury, and that they
24 facilitate appeals to sympathy as opposed to assessments of the
25 evidence on the merits. As I have noted, the defense has not

M75CgilC

1 opposed this motion. It is not inconceivable, in theory, that
2 some data point within the categories described, for example
3 relating to Gillier's background or other personal
4 circumstances, could have some conceivable relevance at this
5 trial, but he has not proffered any relevant evidence along
6 these lines. My ruling, though, is without prejudice. In the
7 event Gillier wishes to elicit evidence of this nature, please
8 raise it with me outside the presence of the jury, either by
9 letter or prior to the jury's arrival in the morning or after
10 the jury is excused for the day in the evening. I can then
11 take up with counsel in an orderly way whether the evidence in
12 question is properly admitted under the rules of evidence.

13 Finally, as to evidence of prior good acts, it is
14 black letter law that "a defendant may not seek to establish
15 his innocence... through proof of the absence of criminal acts
16 on specific occasions." *United States v. Scarpa*, 897 F.2d 63,
17 70 (2d Cir. 1990); see also *United States v. Chambers*, 800
18 F.App'x 43, 46 (2d Cir. 2020); and *United States v. Walker*, 191
19 F.3d 336 (2d Cir. 1999). Similarly, while the defense is
20 permitted to offer general testimony from a character witness
21 regarding Gillier's reputation for a "pertinent trait,"
22 including that witness's opinion of the defendant's capacity
23 for that trait, the defendant is not permitted to testify or
24 offer proof to establish specific acts in conformity with that
25 trait that are not an element of the offense. See, e.g.,

M75CgilC

1 *United States v. Fazio*, 2012 WL 1203943, at *5 (S.D.N.Y. Apr.
2 11, 2012), *affd*, 770 F.3d 160 (2d Cir. 2014).

3 Consistent with these principles, evidence that
4 Gillier previously engaged in non-fraudulent business ventures
5 or that RTF or UAS engaged in legitimate business is irrelevant
6 to whether Gillier committed the crimes alleged. Any argument
7 or evidence that Gillier did not commit fraud on those other
8 occasions or that he committed prior good acts would be
9 excluded as irrelevant to the issues in the case and to
10 demonstrate his good character. Introduction of such evidence
11 would also be excluded under Rule 403, as it could lead the
12 jury to be confused about the actual conduct at issue in the
13 case and unnecessarily lengthen the trial.

14 I'm now going to turn to Gillier's motions *in limine*.
15 To some extent, I have already resolved these alongside the
16 government's motions. I'm going to address only the remaining
17 motions or portions thereof that I've left unaddressed.

18 I've addressed, in resolving the government's motions,
19 Gillier's motion that the Court direct the government to redact
20 certain portions of Gillier's encounters in 2004 and 2005 with
21 agents at the border. The government has agreed to make such
22 redactions.

23 Gillier further seeks to preclude such statements to
24 the extent that the government sought to introduce them in
25 summary form. The government, in its opposition, has

M75CgilC

1 represented that it does not intend to offer any summaries, and
2 that it will offer Gillier's statements only in the
3 question-and-answer format. Gillier does not object to that
4 approach.

5 Gillier objects to the inclusion of evidence that he
6 was denied entry into the United States as being irrelevant and
7 highly prejudicial. I agree, based on the present record, such
8 evidence should be excluded under Rule 403. In its opposition,
9 the government has not indicated why such evidence is probative
10 of the crimes charged, at all. And being turned away at the
11 border for having an improper visa, although hardly
12 inflammatory, could be viewed as an infraction that perhaps
13 might make a jury look askance at Gillier, or wonder about
14 whether he was otherwise a violator of the law, to some degree,
15 anyway. As such, unless the government can better explain the
16 probative value of such events, Gillier's being turned away at
17 the border is excluded under Rule 403. To be clear – this
18 ruling is limited only to evidence of the denial of entry. My
19 ruling that any misrepresentations Gillier may have made –
20 including any representation made imminently before being
21 turned away – stands.

22 I next consider complaints by customers of RTF or
23 other entities associated with Gillier. Gillier reserves the
24 right to object to evidence of such complaints until the
25 government presents it in concrete form. He acknowledges that

M75CgilC

1 such complaints may be relevant to the charged conspiracy if
2 made by customers who purchased airplane parts sold by
3 Honeywell to RTF.

4 Without any particular examples before me, any ruling
5 on this point would be premature. To the extent Gillier seeks
6 to object to narrow the indictment to exclude any evidence
7 post-2006, however, I caution that I have already ruled that
8 post-2006 evidence is admissible as direct evidence of the
9 conspiracy charge.

10 I therefore deny this motion as premature, but grant
11 Gillier leave to renew his objection in advance of any
12 testimony or evidence relating to customer complaints.

13 Gillier next seeks to preclude any references to
14 violations of the ITAR, I-T-A-R, regulations, export
15 violations, or the United States Munitions list from the
16 government's exhibits, and requests that the Court preclude
17 government witnesses from making such references. Gillier
18 appears to be making this motion under Rules 401 and 403. In
19 its opposition, the government agrees not to offer evidence
20 that Gillier was investigated for the improper export of
21 aircraft parts or other violations of ITAR. It requests only
22 that it be excused from redacting any reference, including
23 generic ones, to ITAR, export violations, or the United States
24 Munitions list.

25 On June 30th, 2022, the Court directed the government

M75CgilC

1 to provide examples of such generic reference it sought to be
2 excused from redacting. See Dkt. 92. On July 1, the
3 government provided illustrative examples, including one which
4 I'll briefly describe now: A credit application submitted to
5 Honeywell by UAS. The document contains a statement of
6 certification that must be submitted to Honeywell as part of
7 its credit application and which states, *inter alia*, on page 8,
8 that the customer complies "with applicable United States
9 export control laws and regulations." In its letter, the
10 government reiterated that it will not offer any testimony or
11 argument that Gillier or any entity involved in the case failed
12 to comply with U.S. export law.

13 I find the government's line is a reasonable one. Any
14 reference to laws or regulations that govern the industry that
15 are boilerplate or generic do not require redaction.
16 Similarly, to the extent the government's witnesses mention
17 export compliance in passing – without making any particular
18 reference to compliance by Gillier or the entities in the case
19 – need not be redacted. The mere fact of such regulations – in
20 a highly regulated industry – is not unfairly prejudicial to
21 Gillier.

22 However, I quite agree with the defense that any
23 specific reference to Gillier in connection with such
24 regulations must be redacted. By that I mean, non-exclusively,
25 any evidence suggesting that Gillier was in or out of

M75CgilC

1 compliance with such regulations, or that his compliance with
2 such regulations was a subject of investigation, or the same as
3 to the companies with which he was allegedly affiliated, such
4 as RTF and UAS, or the same as to his alleged coconspirator.
5 And the government, rightly, has made clear that it will make
6 such redactions.

7 Gillier next seeks to preclude numerous documents that
8 purportedly record transactions at issue between RTF and
9 Honeywell and that tend to show that such transactions went
10 unpaid. Gillier seeks to preclude this on several grounds.
11 Gillier argues that the documents should be precluded because
12 (1) they are not complete records of the transactions, and
13 therefore "lack indicia of reliability and trustworthiness,"
14 (2) the records are improper duplicates under Rule 1003; and
15 (3) admission of the documents would preclude meaningful cross
16 examination as to whether additional documents existed and
17 whether any such documents would have revealed delivery or
18 non-delivery of airplane parts to RTF.

19 The government counters that the records it intends to
20 offer satisfy the "low bar" for authentication and admission of
21 business records. *See United States v. Gagliardi*, 506 F.3d
22 140, 151 (2d Cir. 2007), holding that "the bar for
23 authentication of evidence is not particularly high." The
24 government proffers that the records include hundreds of final
25 invoices to RTF, checks from RTF, and debit notifications

M75CgilC

1 pertaining to those checks from Honeywell's bank. The
2 government anticipates authenticating such evidence through the
3 testimony of a current Honeywell employee who was an employee
4 at the time of the alleged fraud, and evidently played a role
5 in its discovery. The government proffers that this employee
6 also testified at the damages phase of the Honeywell litigation
7 in 2007.

8 The motion before the Court is not specific as to any
9 particular record. It is therefore premature to rule as to the
10 admissibility of any exhibit. That will await the testimony at
11 trial, including voir dire by the defense of the authenticating
12 witness if it so elects.

13 As to the completeness of the documents, however, I
14 can say this. The fact that the government does not intend to
15 offer documentation of each of Gillier's and Honeywell's 1,000
16 or so transactions – or even every document bearing on a single
17 transaction – is not a basis for excluding the documents that
18 the government seek to offer. As a condition of admissibility
19 of business records such as invoices, the government is under
20 no obligation to structure its case in that way. Gillier, of
21 course, on cross examination or the defense case, is at liberty
22 to seek to authenticate and offer additional documents, but the
23 government's offer of subsets of the universe of conceivably
24 relevant business records, provided that they are properly
25 authenticated, is not a basis for denying admission.

M75CgilC

1 I understand that Gillier posits that because the
2 events occurred long ago, it took more than a decade to bring
3 him to justice in this country, certain records of the long-ago
4 transactions at issue may no longer survive. That is a proper
5 basis for cross examination and I will give defense counsel
6 latitude to probe in this area. However, again, provided that
7 the records that are offered by the government are properly
8 authenticated, the existence or inability to locate other old
9 business records goes to the weight of the evidence, it does
10 not go to their admissibility. As authority, I would cite you
11 to *Fagiola v. Nat'l Gypsum Co. AC & S.*, 906 F.2d 53, 58
12 (2d Cir. 1990), which held that where incomplete sales records
13 were offered, objections that such records were incomplete went
14 to the weight of evidence, not its admissibility, and *United*
15 *States v. Hathaway*, 798 F.2d 902, 907 (6th Cir. 1986), holding
16 that "the fact that records were missing or unavailable does
17 not evidence a clear abuse of discretion in the district
18 court's finding that the records were trustworthy. Instead, it
19 is an argument which best goes to the weight to be given that
20 evidence."

21 Gillier separately posits that as to certain Honeywell
22 records, it is or may prove to be a problem that the government
23 will be offering photocopies, not originals, and that the
24 witness who will authenticate some of these records is not a
25 currently employed records custodian, but a former employee.

M75CgilC

1 As to the issue of copies, the Rules of Evidence
2 permit copies to be received. Rule 1003 provides that "a
3 duplicate is admissible to the same extent as the original,
4 unless a genuine question is raised about the original's
5 authenticity or the circumstances make it unfair to admit the
6 duplicate." The defendant bears "the burden of demonstrating a
7 genuine issue as to the authenticity of the unintroduced
8 original, or as to the trustworthiness of the duplicate, or as
9 to the fairness of substituting the duplicate for the
10 original." *United States v. Chang An-Lo*, 851 F.2d 547, 557
11 (2d Cir. 1988). As I have explained, the fact that the
12 government does not intend to offer all records of Honeywell's
13 and Gillier's transactions, or even all documents associated
14 with a single transaction, does not compel the conclusion that
15 such records are inauthentic or untrustworthy. *Cf. United*
16 *States v. Knohl*, 379 F.2d 427, 440 (2d Cir. 1967), holding,
17 under the best evidence rule that "the fact that part of a tape
18 recording is missing or inaudible does not render it
19 inadmissible." And Gillier has not cast doubt on these
20 records' admissibility for any other reason, for example, that
21 records were altered in any way.

22 As to the issue of the record custodian, I am unaware
23 of any rule of evidence that requires current employment as a
24 precondition for a business records custodian to properly
25 authenticate such records. In order to admit a business

M75CgilC

1 record, a foundation must be established by the "testimony of
2 the custodian or other qualified witness of the record."
3 *United States v. Friedin*, 849 F.2d 716, 719-20 (2d Cir. 1988)
4 (quoting Rule 803 (6)). "This circuit has recognized that a
5 custodian who testifies as to the authenticity of a record need
6 not have a firsthand knowledge of the creation of the record."
7 *United States v. Reyes*, 157 F.3d 949, 952 (2d Cir. 1998). "The
8 custodian or other qualified witness who must authenticate
9 business records need not be the person who prepared or
10 maintained the records, or even an employee of the
11 record-keeping entity, so as long as the witness understands
12 the system used to prepare the records." *In re: Enron*
13 *Creditors Recovery Corp.* 376 B.R. 442, 456 (Bankr. S.D.N.Y.
14 2007).

15 The issue in all events is and will be at this trial
16 whether the witness on the stand is capable of laying the
17 foundation required by Rule 803(6). There is no law or
18 precedent precluding a former employee from doing so. Beyond
19 that, I simply cannot rule at this time as to admissibility.
20 That turns on the details. I must await the specific evidence
21 that the government elicits as to the particular Honeywell
22 business record at hand, that will permit me to determine
23 whether a proper foundation to authenticate these records has
24 been laid.

25 Finally, Gillier seeks to preclude the government's

M75CgilC

1 proposed summary witness, Scott Holt, from testifying on the
2 ground that Mr. Holt's categorization as a summary witness
3 instead of an expert witness is a "subterfuge." Mr. Holt is a
4 forensic accountant. Gillier argues that Mr. Holt will
5 necessarily provide an expert opinion as to Gillier's alleged
6 fraud.

7 The government has committed that Mr. Holt will not
8 testify as an expert witness. The government represents that,
9 notwithstanding his professional training, he will serve solely
10 as a summary witness. It advertises that he will distill reams
11 of financial documents into summary charts, which, of course,
12 is a familiar role played by lay summary witnesses. His
13 testimony, the government represents, will include only
14 summaries of the purchase orders, checks, stop payments, and
15 other such records admitted in the case. The government
16 assures that Mr. Holt's testimony will not address such matters
17 as "trends" in the area of fraud, and such, indeed, would be
18 impermissible.

19 I deny Gillier's motion to preclude Mr. Holt from
20 testifying as a summary witness. On the proffer before me,
21 there is no aspect of his anticipated testimony that qualifies
22 as expert testimony. The mere fact of Mr. Holt's occupation as
23 a forensic accountant does not disqualify him – or over-qualify
24 him, if such was even a thing – from serving in a summary
25 witness capacity. See *United States v. Blakstad*, 2021 WL

M75CgilC

1 5233417, at *4 (S.D.N.Y. Nov. 9, 2021), in which Judge Ramos
2 concluded that an accountant properly testified as a summary
3 witness by summarizing voluminous financial records in a
4 financial fraud case. I am relying here, of course, on the
5 government's representations as to the nature of and boundaries
6 upon Mr. Holt's testimony. Should his testimony stray into the
7 realm of expert opinion, this ruling does not apply, and the
8 defense will be at liberty to object. But I will not preclude
9 Mr. Holt from testifying outright. His testimony, as proffered
10 by the government, is admissible.

11 That concludes my ruling.

12 Let's take a 10-minute recess.

13 (Recess)

14 THE COURT: Counsel, before I turn to the other
15 matters that I indicated, I wanted to take up with you, let me
16 just close the loop on a couple of the items that I covered in
17 the bench rulings.

18 Government, I couldn't tell whether there are
19 additional counseled statements by Mr. Gillier that you
20 intended to put before the jury. Are there?

21 MS. McLEOD: Your Honor, yes, I believe there will be
22 and we will put in a letter specifying that.

23 THE COURT: Just raise it with Mr. Ginsberg first
24 because it may well be that they're unopposed and it may be
25 that the objection was really the where's Waldo quality of the

M75CgilC

1 earlier offer. My guess is if you specify what the statements
2 are, you may not get any opposition, and it will be useful for
3 me to know that when your letter comes in.

4 MS. McLEOD: Will do that, your Honor.

5 THE COURT: Next issue involves the doctor. I
6 understood you not to be seeking to prove up through the
7 doctor's secondhand testimony his medical conclusion that there
8 had been some medical manipulation. Did I read that right?

9 MS. McLEOD: That's correct. We don't intend to offer
10 that in our case and chief. As your Honor noted, it could come
11 in in another phase of the trial.

12 THE COURT: Mr. Ginsberg, the next question involves
13 the substantive counts in whether you might be seeking a
14 limiting instruction with respect to the post mid-2006 conduct.
15 There is absolutely no reason for to you decide that, but I'm
16 just flagging that as something for you.

17 MR. GINSBERG: I decline.

18 THE COURT: I thought you would, but I'm offering.
19 Okay.

20 The next issue involves the *Bourjaily* predicate.
21 Government, you came fairly close in the letter, but I must
22 say, I just need to be able to make the predicate finding that
23 these organizations were, in fact, participants, if you will,
24 in the conspiracy. I suppose it is a nice question about what
25 one does about the individual functionary employee, but I think

M75CgilC

1 if the employee is serving in his capacity as a party, he's a
2 representative of an organization that is in furtherance of the
3 employee's own guilt as opposed to the corporation's is what
4 matters. Either way, though, I'm going to need a little more
5 of a proffer. I'm happy to receive that at a later point.

6 MS. McLEOD: Yes, your Honor.

7 THE COURT: And finally, Gillier's having been turned
8 away at the border, it did not appear to me the government was
9 seeking to offer that, but let me clarify.

10 MS. McLEOD: We were proposing not to redact that part
11 of the question and answer.

12 THE COURT: No, the outcome, which is you may not
13 enter. This is pre-2006, and I understood you not to be
14 offering the bottom line that he was being forbidden entry.

15 MS. McLEOD: We were proposing to offer that. It is
16 part of, sort of, the witness's narrative and it is actually in
17 the Q&A, and he says this is why I am not allowing you into the
18 country. But we can certainly --

19 THE COURT: The important thing is I don't want an
20 adverse inference to arise about the mysterious reasons he was
21 excluded. If you need to establish that he didn't enter the
22 country because that explains the way the scheme then proceeded
23 or stalled, that's another story, that's a perfectly good
24 probative reason. There is probative value if his nonadmission
25 is necessary to explain subsequent operational issues with

M75CgilC

1 respect to the scheme – his nonpresence at a meeting, why
2 somebody else took on some responsibility. But, without that,
3 you have no explainable probative value, at least as it's been
4 proffered to me, to his being excluded, and you have some
5 degree of negative inference, even if it's not deeply
6 inflammatory, it's a little bit of a mystery – people usually
7 don't get excluded, what happened here?

8 MS. McLEOD: We can redact the Q&A portion at the end
9 where he essentially explains to the defendant, here's why you
10 are being refused admission. I can also tell the witness we
11 are not planning on getting into what eventually happened.

12 THE COURT: At the border.

13 MS. McLEOD: I do expect, as Mr. Ginsberg has
14 proffered, that the defendant will testify and it may become
15 relevant on cross the fact that he then later entered the
16 country again.

17 THE COURT: I'm not touching cross here. I understood
18 the motions to be directed to the government's case.

19 What I'm not hearing you say is that Mr. Gillier's
20 failure to secure entry on those dates is probative of anything
21 in your direct case.

22 MS. McLEOD: I think that's right, your Honor.

23 THE COURT: Very good. Let's then turn to other
24 issues. Let's, first of all, just talk about what days we are
25 sitting.

M75CgilC

1 Jury selection will begin on Tuesday the 12th. Per
2 our prior discussion, Mr. Ginsberg, I understand it's important
3 that we sit only four days a week, but you're comfortable next
4 week sitting Tuesday through Friday, and I had intended the
5 following week, and to the extent the trial might extend into a
6 third week, to sit Monday through Thursday.

7 Mr. Ginsberg, most important, does that work for you?

8 MR. GINSBERG: It does, your Honor.

9 THE COURT: Any other limitations I need to be aware
10 of?

11 MR. GINSBERG: This is not a limitation, but it's an
12 emergent issue.

13 THE COURT: It's a?

14 MR. GINSBERG: An emergent issue.

15 THE COURT: Closer to the mic.

16 MR. GINSBERG: An emergent issue. Unfortunately, my
17 partner who's not present today tested positive for COVID on
18 Thursday. I started feeling unwell on Friday and I tested
19 three times since then, first a home test and two PCR tests,
20 and I've tested negative, but I'm still feeling unwell. So I'm
21 going to continue to test because I don't want to come into the
22 court --

23 THE COURT: Why don't you put your mask on for now
24 then.

25 MR. GINSBERG: That's why I had it on.

M75CgilC

1 THE COURT: You're not obliged to under the rules, but
2 that just seems prudent.

3 Look, obviously, I'm not going to make a judgment
4 about what to do based on unknown circumstances. In the event
5 you test positive, let your adversary and the Court know as
6 soon as possible and be as concrete as you can about what you
7 believe the ramifications to be.

8 MR. GINSBERG: I will.

9 THE COURT: Right now, as to your law partner's
10 testing positive, as one who a few weeks ago tested positive on
11 a Thursday, I was allowed back in here a week from the
12 following Monday. So applying *in re: Engelmayer* to your law
13 partner, if things follow that familiar form, he would likely
14 be able to be here the day before trial, but you'll let me
15 know.

16 In any event, that's our schedule.

17 Government, I'll need two copies of 3500 binders and
18 two of Government Exhibits, one for me and one for my law
19 clerk. Any time this week is fine.

20 MR. MCGINNIS: Your Honor, a quick question on that.

21 THE COURT: You may take your mask off.

22 MR. MCGINNIS: Thank you, your Honor. For purposes of
23 3500, the government has started producing 3500 material of
24 witnesses we do not expect to testify. That can create quite a
25 few witnesses and substantially increase the size of the 3500

M75CgilC

1 binder. Would the Court prefer if we limited the production to
2 the Court only to 3500 of witnesses we expect to testify?

3 THE COURT: Yes, that's fine. If you're producing
4 binders anyway, give me one binder, consolidate the testifying
5 versus the non. But yes, what's important is I have the
6 testifying witnesses, and if somebody gets added to that list,
7 I'll promptly get the 3500. Thank you. Thoughtful question.

8 Let me ask the government in particular, do you intend
9 to be introducing any prior testimony? I note that there is
10 civil litigation in the background of this case.

11 MS. McLEOD: We do not, your Honor.

12 THE COURT: That's fine.

13 Mr. Ginsberg, you presumably are privy to deposition
14 or other testimony from the civil case. Have you any
15 expectation to use any prior testimony to examine --

16 MR. GINSBERG: No, your Honor.

17 THE COURT: The only reason I ask is, this happens in
18 civil litigation all the time where there are depositions that
19 have been taken and you wouldn't believe how often it is that
20 the prior testimony is bungled, misused, tried to be put before
21 the jury, or there is really no acceptable prompt for it. So I
22 developed a system where I ask counsel to get me the prior
23 testimony in advance, and if they believe there has been an
24 inconsistency from the witness stand with prior testimony, to
25 say, Judge, pages 76, lines 1 through 6, I will quickly eyeball

M75CgilC

1 it, confirm that it is proper, then authorize you to confront
2 in the way that is proper under the rules of evidence. If
3 we're not going there, there is no reason to go into all that,
4 but if it looks like there may be, I just want to take a moment
5 with you to make sure we have that choreography down.

6 MR. GINSBERG: Does that apply to refreshing
7 recollection from statements that may be in documents --

8 THE COURT: No, because if you're refreshing, you're
9 putting it in front of the witness.

10 MR. GINSBERG: I understand.

11 THE COURT: The concern for me, Mr. Ginsberg, is the
12 situation in which a lawyer's question effectively smuggles
13 before the jury the content of prior testimony that really
14 isn't properly called for, and that's why I assist on taking a
15 look at it, to make sure that it actually is within bounds and
16 isn't a bunch of rambles or areas that are not appropriate.
17 But for refreshing, I was taught in trial advocacy you can
18 refresh a witness's recollection with a pizza box, so I don't
19 have a problem with your doing that.

20 MR. GINSBERG: Okay.

21 MS. McLEOD: Sorry, your Honor. This may not actually
22 implicate the concerns that you are raising, but I just wanted
23 to flag this in case you wanted to do something with it.

24 Due to the age of the case and the fact that there
25 were some parallel investigations in litigation, there may be

M75CgilC

1 some offering through testimony of things as a recorded
2 recollection. We are obviously going to lay the foundation for
3 that and it should be clear what we are directing --

4 THE COURT: As long as I've got it in front of me and
5 it's clear what you're doing, that gives the opportunity to
6 stop you if there is an issue. And obviously, Mr. Ginsberg,
7 given what you're proposing to do, we'll be in a position to
8 object.

9 The challenge becomes, in the course of an
10 examination, say in a civil case, where the witness says the
11 light was red and the examiner then says, well, did you testify
12 under oath like you did today, were you asked the following
13 questions and did you give the following answers, and the
14 questions and answers involve the witness's complicity in a
15 triple homicide, and suddenly that's all read aloud and
16 nobody's given notice. That's the worry.

17 MS. McLEOD: Yes.

18 THE COURT: Very good. Next, let's talk about *voir*
19 *dire*.

20 The good news is that Mr. Smallman has secured
21 courtroom 318 in this building for *voir dire*. The trial will
22 be held here, but the *voir dire* will be done there, and the
23 reason is simply because of the sheer number of people.
24 There's more space there.

25 I expect and I'm just going to go through a few of the

M75CgilC

1 mechanics of *voir dire*, although I know two of the lawyers, one
2 for each side, have had trials before me.

3 I expect to seek four alternates, and that means using
4 the struck-panel method that we will have to preclear, before
5 the exercise of peremptory challenges, 36 people. In other
6 words, you'll each have an extra strike directed to the
7 alternates. You don't waive any strike by taking people out of
8 order. You know all this. This is familiar stuff.

9 I will need from the government, but also as
10 supplemented by the defense, a list of any people that may be
11 mentioned, including corporate entities at trial, and any
12 places that truly matter. I don't think Kansas matters here,
13 unless there's something memorable about a location in Kansas.
14 So since it's not going to prompt, I think, any prejudice, I
15 don't need to know that sort of thing, but if there is a venue
16 or for some reason it matters, I would like to know that, too,
17 but please kindly get that to me by late this week.

18 I need to know who's going to be at the table for each
19 side both during the *voir dire* and during the trial.

20 For the government, am I correct that it's the two
21 counsel who are here and Geoffrey Mearns?

22 MS. McLEOD: Who will be at counsel table, your Honor?

23 THE COURT: Yes. Is he your legal assistant?

24 MS. McLEOD: Yes, he is our paralegal.

25 THE COURT: Very good. Welcome.

M75CgilC

1 MS. McLEOD: We have a third AUSA partner who is
2 traveling back to New York right now, that's why he is not
3 here, Micah Fergenson. I think we will probably have three
4 AUSAs at the table and possibly Jeff at the back, but it will
5 be three, I think, because of the limit.

6 THE COURT: I think you're allowed four, Mr. Smallman
7 will let us know offline, but the important thing is in *voir*
8 *dire*, I need to identify all four.

9 MS. McLEOD: Yes.

10 THE COURT: Will you expect anyone else from the
11 government to be at your table at any point?

12 MS. McLEOD: Our trial agent may be in and out as a
13 trial agent.

14 THE COURT: At the table or in the back?

15 MS. McLEOD: Probably in the back. So I think at our
16 table, it will be the three AUSAs, that includes Mr. Fergenson,
17 plus Geoffrey Mearns.

18 THE COURT: Why don't you include the trial agent on
19 the list of names that may be mentioned.

20 Mr. Smallman tells me that there is no limit, provided
21 everybody is vaccinated, but four is the ideal cap.

22 Mr. Ginsberg, is it you, Ms. Limani, and hopefully
23 Mr. Freeman joining your client at the table?

24 MR. GINSBERG: Yes, your Honor.

25 THE COURT: Anybody else?

M75CgilC

1 MR. GINSBERG: No.

2 THE COURT: Let me read to you a short summary that I
3 propose to give of the case to the venire, again, just to spot
4 whether there is any issue here that we need to be sensitive
5 to.

6 As you're going to see, the paragraph or two that I
7 list here, includes a number of corporate entities who I
8 understood the government claim to be victims. If I'm
9 overdoing it here, I'm happy to have those cut out. These may
10 be the entities that were listed to me when I wanted to
11 ascertain that there wasn't any conflict that precluded my
12 service to the case because I think that's what happened to my
13 predecessor on the case, but you'll let me know. Again, this
14 is me speaking to the venire.

15 So you can understand the reason for the questions I
16 will be asking you shortly. I will now tell you briefly about
17 this case. I want you to understand that nothing I say today
18 regarding the description of the case is evidence. The
19 evidence you will consider, if selected as a juror, will come
20 from the trial testimony of witnesses and from exhibits that
21 are admitted into evidence.

22 As I explained, this is a criminal case. It is
23 entitled United States of America v. Stefan Gillier.

24 The defendant, Mr. Gillier, has been charged with the
25 commission of federal crimes in an indictment filed by a grand

M75CgilC

1 jury sitting in this district.

2 The indictment charges that Mr. Gillier participated
3 in a conspiracy to defraud aircraft part manufacturers. It
4 charges that the conspirators placed orders for aircraft parts,
5 promising to pay for these parts, but once the parts had been
6 shipped, they stopped payment on the checks to pay for the
7 parts. It charges that the conspirators were able to re-sell
8 the parts they received but had not paid for, and thereby made
9 millions of dollars. The indictment alleges that this
10 conspiracy occurred between 2004 and 2010. It alleges that the
11 companies whom the conspirators sought to defraud included
12 Honeywell, Pratt & Whitney, Dallas Airmotive, Twin Aviation,
13 Stair Cargo, Alpha Sentinel, and Aerospace Logistics. Overall,
14 the indictment brings eight counts, or charges against
15 Mr. Gillier. These are for conspiracy, mail fraud, wire fraud,
16 and money laundering.

17 Mr. Gillier denies all these charges.

18 Now, let me stress again that an indictment is not
19 evidence. It simply contains the charges against the
20 defendant, and no inference may be drawn against the defendant
21 from the existence of the indictment. You must always keep in
22 mind that the defendant is presumed innocent, that he has
23 entered a plea of not guilty to all charges, and that the
24 government must prove the charges in the indictment beyond a
25 reasonable doubt.

M75CgilC

1 That would be what I proposed to read to the jury.
2 Government, any corrections?

3 MS. McLEOD: Your Honor, we would propose changing
4 "made millions of dollars" to "stole millions of dollars in
5 parts."

6 THE COURT: Okay.

7 MS. McLEOD: And the key victims that will sort of be
8 referenced at trial would be Honeywell --

9 THE COURT: Is there a full name for Honeywell?

10 MS. McLEOD: It's just Honeywell. Pratt & Whitney,
11 and Dallas Airmotive.

12 THE COURT: The other four, could I leave out?

13 MS. McLEOD: Yes.

14 THE COURT: Is the jury going to hear about them?

15 MS. McLEOD: There won't be any witnesses from those
16 companies.

17 THE COURT: Okay. Include them on your list of names
18 to be mentioned in the remote chance some juror has some
19 connection, that should be enough to raise them up. For the
20 purposes of the narrative, I'll end after Dallas Airmotive?

21 MS. McLEOD: Yes.

22 THE COURT: Otherwise okay, Mr. Ginsberg, you're fine?

23 MR. GINSBERG: Yes.

24 THE COURT: Length of the trial. Let's operate on the
25 assumption that jury selection takes all day and that your

M75CgilC

1 opening either at the end of the day or first thing the next
2 morning. But let's also assume, as both Ms. McLeod and
3 Mr. Ginsberg know, that I move quickly and work a full 9:30 to
4 5:00 day with an hour break at lunch and a 15-minute break in
5 the morning and the afternoon, but I'm really working you hard
6 and making tracks.

7 Realistically, how long is this trial likely to last,
8 Ms. McLeod?

9 MS. McLEOD: So some of this will depend a little bit
10 on the outcome of stipulations. We are calling a fair number
11 of record custodians, but right now, our best estimate, and
12 this is also based on the fact that we understand Mr. Gillier
13 will be testifying through an interpreter and that could take a
14 full day for a defense case, we think the government may rest
15 on maybe July 19th, that's a Tuesday.

16 THE COURT: Wait a minute. We're starting on the
17 12th.

18 MS. McLEOD: Yes.

19 THE COURT: There are four days of trial which,
20 hypothetically, the first one is basically jury selection.

21 MS. McLEOD: Yes.

22 THE COURT: You're suggesting that there would then be
23 three days in which evidence would be received, the 13, 14th,
24 and 15th, a weekend, the 16th, and 17th, you'd receive
25 government evidence on the 18th and then sometime on the 19th,

M75CgilC

1 you're apt to rest; correct?

2 MS. McLEOD: This is a guesstimate, but the way we
3 have sort of been attempting to plot it out and, as your Honor
4 knows, it's an art, not a science, we sort of had been aiming
5 for possibly having closings maybe Monday, July 25th, depending
6 on how long Gillier --

7 THE COURT: Part of the issue involves what I tell the
8 jury. I'm not going anywhere near how much time you have for
9 closing.

10 MS. McLEOD: And that wasn't what I was --

11 THE COURT: But the premise there is, let's suppose
12 you rest at the end of the day on the 19th, then the question
13 would be the length of the defense case, but in theory, if the
14 government rested on the 19th, I heard whatever Rule 29 motions
15 at the end of the day on the 19th, hypothetically, the defense
16 would then begin on the 20th, then the question would be
17 whether the defense case is apt to go one day or more than one
18 day.

19 Let me ask you, Mr. Ginsberg, obviously the trial
20 hasn't begun, I'm just trying to measure my language right for
21 the jury. Have you a projection here? Is the government's
22 estimate, to your knowledge, of its case realistic, first of
23 all?

24 MR. GINSBERG: I think it is given what I believe to
25 be their strategy in terms of how they're going about trying

M75CgilC

1 this case. I think, frankly, without making further comment,
2 that trying the case via heavy documents and fewer live
3 witnesses, which should make it go quickly because it's hard to
4 cross examine thousands of checks.

5 THE COURT: You were wonderful in the 12-week trial
6 you and I had, you focused on what mattered and genuinely,
7 properly stipulated to things without forcing anybody to do
8 anything. I hope you will do that.

9 MR. GINSBERG: I heard what the government just said.
10 It's my intention to stipulate where we can stipulate. There
11 are some real issues concerning certain banks.

12 THE COURT: I appreciate that this is an ancient case,
13 no fault there, just the way it is, and that may open the door
14 to lines of questioning that might not have occurred. I'm
15 asking you to be the professional I know you are and stipulate
16 when you can. I know you will.

17 How long would you guess, based on what you know now,
18 the defense case is apt to last, a day, two days?

19 MR. GINSBERG: I think a full day. Sort of the wild
20 card is that Mr. Gillier is going to be testifying in French
21 and, as the Court knows, sometimes that just adds additional
22 time to the testimony for all kinds of reasons.

23 THE COURT: Right.

24 MR. GINSBERG: There's a lot to cover.

25 THE COURT: Okay.

M75CgilC

1 MR. GINSBERG: We've already sort of gone over what we
2 anticipate doing, but there will be more. So I think a full
3 day I would be a good guess.

4 THE COURT: At this point, without holding you to it,
5 is it reasonable to expect that will be all to the defense case
6 or will there be stipulated documents or are you apt to have
7 substantially more? Not holding you to it, just trying to get
8 a ballpark.

9 MR. GINSBERG: I don't think it will be substantially
10 more. I can tell the Court, and I gave a heads up to the
11 government about a week ago, based on the Court's ruling today,
12 we may want to call a government agent. If the government
13 tells me they're going to require a Touhy letter, but we may
14 need to call that witness, I don't think that testimony would
15 be long, assuming that the Court permits it. I'm sure the
16 government is going to object, but I believe the Court will
17 permit the testimony.

18 THE COURT: Why don't we do this, I don't need to hear
19 about that now if it hasn't been fully engaged with, but I've
20 had enough Touhy situations to know that sometimes they can get
21 tricky. To the extent you're reserving the right to do that,
22 let's get in motions to make sure --

23 MR. COHEN: We'll do it today. I didn't want to do it
24 until I knew what the Court's ruling was on a certain issue now
25 that I know I have to proceed that way.

M75CgilC

1 THE COURT: I take it whatever the ruling is in
2 question, it makes it more potentially necessary for you to
3 call that witness.

4 MR. GINSBERG: That's correct.

5 THE COURT: Very good. So in any event, assuming that
6 Ms. McLeod's projection is right, that the government, let's
7 say, hypothetically, were to rest on Tuesday the 19th, under
8 any circumstances, you're going the entirety of the following
9 day, at least potentially into the next day, Thursday, the
10 21st; right?

11 MR. GINSBERG: Sounds right.

12 THE COURT: Correct?

13 MR. GINSBERG: Yes, that sounds right, your Honor.

14 THE COURT: So I think all I need to do now is tell
15 the jury what we are expecting, and I think it's therefore
16 reasonable for me to say that parties expect the trial to last
17 between two and two and a half weeks. Is that a fair estimate?
18 It's a little bit blurry, it doesn't come down with specific
19 dates, and I will make it clear to them that, should the trial
20 extend into a third week, we would be sitting Monday through
21 Thursday of that week?

22 MS. McLEOD: Yes. I think that's the important part
23 that the jury understands that it could extend into the week of
24 the 25th.

25 THE COURT: Okay. Mr. Ginsberg, does that accord with

M75CgilC

1 your expectations?

2 MR. GINSBERG: Yes, your Honor.

3 THE COURT: Mr. Smallman asks me whether, if we were
4 to have sat the first four days of the week beginning the 18th,
5 we could sit on the 22nd. Mr. Ginsberg, I understood that, for
6 personal reasons, that's out of bounds, right, you don't need
7 to say anymore, but is that correct?

8 MR. GINSBERG: I need one day a week.

9 THE COURT: Very good. That's why I was asking. Say
10 no more.

11 I expect, based on my limited knowledge of the case,
12 that the big issue in jury selection is going to be claims of
13 hardship because there's often, as you all know, a bit of a
14 bright line between the people, where people see two weeks and
15 a little bit more, and this case has a little bit more than
16 that.

17 What I'm expecting to do is to have a written
18 questionnaire, and I'll go through my questions with juror
19 No. 1 and then, for all future jurors, I'll ask them to just
20 give me the numbers of any questions as to which they had "yes"
21 answers.

22 One of them, of necessity, will be the hardship
23 question. I expect to largely take that stuff up at the
24 sidebar as much as I possibly can. And my practice has been to
25 not announce to the venire, which, in our case, the 36 are

M75CgilC

1 being struck, until I've gone through all 36 simply because it
2 becomes obvious to people that it's fruitful to play the
3 hardship card. You get more people who play the hardship card.
4 So I expect what I'll do is bring the people to the sidebar,
5 have them step aside, I will either rule or seek your views,
6 but eventually rule on the hardship application, but the juror
7 will, in all likelihood, wind up taking their seat so that at
8 the end of the 36, I announce who the eight or ten or twelve
9 are who are being struck, but nobody has been able to cue their
10 responses based on how to roll the judge, to be very blunt.
11 I've seen it happen both ways and I think that's smart time
12 management. So just FYI.

13 Government, I saw your list of additional questions
14 with respect to *voir dire*. I just want to understand why some
15 of these are relevant. Aerospace, connections to the three
16 victims, that's fine. There will be, in my usual biographical
17 questions after for-cause questions, I ask if you've served in
18 the military, but is there any reason to think that that's apt
19 to yield a for-cause objection as opposed to being of interest?

20 MS. McLEOD: We're fine with not having that specific
21 question in there. I think it was partially because Honeywell
22 is a large defense contractor and Department of Defense was
23 originally one of the agencies on the case, but it's not so
24 tailored, I think, as to require a specific question.

25 THE COURT: My practice, as you will recall, is that

M75CgilC

1 after asking all the for-cause questions and clearing 36 people
2 here, as against for-cause challenges, to then have each of the
3 jurors read aloud from a one-page, in effect, questionnaire to
4 tell us 90 seconds, two minutes about themselves, and I act it
5 out myself just to give them a sense of tone. One of those
6 questions is, have you ever served in the military. I think
7 that should be enough for your purposes.

8 Shipping company, banking industry, credit card debt
9 collection. I mean, the problem is those questions are apt,
10 everyone's had a problem with their credit card and the issue
11 is -- if it's important, I'll do it, but the more questions
12 like that that one asks, the more we wind up stirring up a lot
13 of irrelevance.

14 MS. McLEOD: We have no objection to removing that
15 question.

16 THE COURT: What about shipping company, banking
17 company? Nowadays, Amazon is a shipping company. We're all
18 having problems with shipping companies from time to time and
19 they're pretty ticky-tacky. You tell me, is there really a
20 scenario here where some juror's life experience like that is
21 really going to be meaningful to you?

22 MS. McLEOD: I think given the detailed nature of the
23 summary of the case, I would expect they would be able to
24 hopefully spot the issue of working logistics at a shipping
25 company versus, I occasionally don't get my amazon packages. I

M75CgilC

1 think the other questions in *voir dire* should sufficiently
2 cover that concern.

3 THE COURT: Mr. Ginsberg, you saw the government's
4 proposed *voir dire* at docket 83-1, including banking, credit
5 card debt collection, shipping. Are any of those questions
6 important to you?

7 MR. GINSBERG: No, your Honor.

8 THE COURT: Is there anything special to this case
9 beyond hardship that I ought to be zeroing in on? I understand
10 in general disputes with the government and stuff. Are there
11 questions that matter to you in particular in *voir dire*? You
12 know how I generally do it. I'm just trying to spot things
13 that are tailored to this case.

14 MR. GINSBERG: I thought about it. I don't think they
15 really are, your Honor.

16 I did include in our *voir dire* request that you make a
17 comment to the jury about the fact that Mr. Gillier is using
18 the French interpreter.

19 THE COURT: Right. And the way I was going to do it
20 was not far off from the way the government's question 10 is,
21 in effect, as a factual matter, I will state that although he
22 speaks English, his native language is French, and for court
23 proceedings, it will be easier for him to have the proceedings
24 translated into French, which I have approved. Will any juror
25 hold that against him? Everyone is going to say no. But I

M75CgilC

1 take it that's a useful way of introducing them to that concept
2 that is nonprejudicial.

3 MR. GINSBERG: That's correct. But you'd be surprised
4 about how many people have problems with the French.

5 THE COURT: Well, I mean, look, the fact that he is a
6 French national. Is he a French national?

7 MR. GINSBERG: Belgium national.

8 THE COURT: Well, is that going to come out?

9 MR. GINSBERG: I think it probably will, given what I
10 understand to be the government's proof.

11 THE COURT: Do you want me to ask --

12 MR. GINSBERG: Also, he's going to testify.

13 THE COURT: Right. I'm not aware of anyone, since
14 1945, who's had any problems with Belgium. Do I need to ask
15 about that?

16 MR. GINSBERG: No.

17 THE COURT: All right. Defense clothing, pivoting
18 completely now off of *voir dire*, have you put in a clothing
19 order?

20 MR. GINSBERG: Your Honor --

21 THE COURT: Or do you not want one?

22 MR. GINSBERG: I'll tell you what's happening. We've
23 been calling the MDC and emailing the MDC for the better part
24 of a week and a half. We can't get a response from them about
25 what they're doing. I know other lawyers have had clothes

M75CgilC

1 turned away from the jail. I bought clothes the other day and
2 my intention was to bring the clothes to the courtroom and have
3 him change in the morning. It is far easier than dealing with
4 the MDC on a regular basis.

5 THE COURT: Well, look, I don't want to delay our
6 trial because --

7 MR. GINSBERG: I don't think it will delay --

8 THE COURT: But the problem is the jury is going to be
9 arriving and they'll be waiting in the jury room. I don't want
10 a situation that, it's an old courthouse, there isn't a
11 dedicated defendant's elevator, if Mr. Gillier is traveling in
12 prison garb, there is too much of a risk of somebody bumping
13 into him and then having a whole hornet's nest of issues. I
14 would much rather task the government with running interference
15 with the MDC and making sure that Mr. Gillier's clothing is
16 here, and I'll ask you, as well, to bring a set here so that if
17 there is some horrible snafu, we have an extra set.

18 MR. GINSBERG: I don't have multiple sets of certain
19 things, but I'll deal with the MDC.

20 THE COURT: Just get me the order so I can issue it.
21 Honestly, I've had this problem many times and it's not
22 ultimately been an issue when I issue the relevant order. I
23 appreciate that we've all had, the last couple years, a higher
24 number of compliance issues with our local federal holding
25 facilities, but that's one that I've not had a problem with.

M75CgilC

1 MR. GINSBERG: Well, as long as we're talking about
2 the MDC, we saw our client on Thursday, we communicated with
3 him over the weekend, we spoke to him today, he continues to
4 have enormous problems with the MDC abiding by the Court's
5 order. We've called the government, we've called the MDC.

6 THE COURT: The order in this case is about clothing.
7 I have not been asked to issue one yet.

8 MR. GINSBERG: You issued an order previously to the
9 MDC for a laptop and for X amount of hours that he be able to
10 go and use it in the visiting room. The guards on his floor
11 don't care about court orders.

12 THE COURT: You need to intervene with me, then. The
13 problem is, I'm very solicitous of this, you can ask the
14 lawyers in the last couple of criminal trials that I've had in
15 other cases that didn't approach trial, I have been very
16 activist about this set of issues and have generally tasked the
17 government, successfully, with running interference on them.

18 The problem, Mr. Ginsberg, is this is news to me. If
19 there is something you need me to do and you have not been able
20 to get results through the government's intercession, you need
21 to let me know. For now, the relevant issue involves the
22 clothing order. Get me a clothing order, I will sign it, and
23 make sure that the government conveys to the MDC that it needs
24 to comply.

25 Ms. McLeod, I'm mindful that the chief of the criminal

M75CgilC

1 division and the deputy have both been very hands-on in dealing
2 with all issues at MDC. Please make sure they know the issues
3 that Mr. Ginsberg has raised just now, but more than that, how
4 important it is that the clothing order be strictly complied
5 with every day at trial.

6 MS. McLEOD: Yes, your Honor.

7 THE COURT: French interpreter, Mr. Smallman tells me
8 that the interpreter has been lined up every day, we should be
9 fine on that.

10 Next issue involves plea offers. We're almost done
11 with my list.

12 Mr. Gillier, it's important that you listen closely to
13 what I'm about to elicit from the government. I'm going to ask
14 the government whether there have been any plea offers, what
15 they were, and what response the government got from the
16 defense. I'm going to then confirm the same with Mr. Ginsberg,
17 and then I'm going to put to you to confirm that those plea
18 offers were communicated to you, and that if any were made and
19 turned away, you were the one who decided that.

20 Go ahead Ms. McLeod.

21 MS. McLEOD: Yes, your Honor. On April 7th, the
22 government extended a plea offer to the defendant to Count One,
23 which is the 371 count. The guidelines range was 108 to 135,
24 but because it was to 371, it was capped at 60 months. The
25 guidelines offense level in the plea offer was 31. That offer,

M75CgilC

1 when we extended it, we told defense counsel it would expire on
2 April 21st. We did not receive a positive response to the plea
3 offer.

4 THE COURT: Did you receive any response?

5 MS. McLEOD: From what I recall, we did not receive
6 any response.

7 MR. GINSBERG: That's not true.

8 THE COURT: We'll get there.

9 MR. GINSBERG: Why would you even --

10 THE COURT: Mr. Ginsberg, I'll get there in a moment.
11 Let me --

12 MS. McLEOD: We're not trying to cast aspersions on
13 Mr. Ginsberg. This was --

14 THE COURT: Were you the AUSA responsible for the case
15 at the time?

16 MS. McLEOD: I had just been added and Michael Neff
17 was corresponding with Mr. Ginsberg. My understanding is we
18 had an open line of communication with Mr. Ginsberg, but in the
19 two weeks, I remember that we -- I think we had reached out to
20 him during those two weeks. It's not a question of there was
21 no communication. I just don't remember.

22 THE COURT: Let me see if I've got this right because
23 I think it is unnecessary to have aspersions cast. What I
24 think you are saying to me is you understood the offer to be
25 open for two weeks, that you were not the primary person

M75CgilC

1 communicating with Mr. Ginsberg, but you're left with a clear
2 understanding that the offer was not accepted as of the 21st,
3 but you don't personally remember whether a declarative no was
4 given. Am I getting that right?

5 MS. McLEOD: That's correct.

6 THE COURT: Prior to April 7th of this year, was any
7 plea offer ever extended, any formal plea offer?

8 MR. GINSBERG: Are you asking me, your Honor?

9 THE COURT: No, I'm asking the government.

10 MS. McLEOD: I don't believe so, your Honor.

11 THE COURT: So Mr. Ginsberg, as clearly as you can,
12 what, if any, plea offers were extended to your client from the
13 government, formal plea offers, not just general discussion.

14 MR. GINSBERG: The government and I discussed on many
15 occasions the contours of a plea offer. Finally, I received a
16 written plea offer from the government. It was a one-count
17 conspiracy offer with a maximum sentence of 60 months because
18 of the statutory cap, even though the guidelines were
19 significantly higher. I spoke to my client about the plea
20 offer on numerous occasions.

21 I communicated with Michael Neff on numerous occasions
22 that my client did not wish to accept the offer. We discussed
23 other things, as well, but I was clear as could be, because we
24 were getting to the point where we had worked on this case for
25 a long time and he needed some clarity as to what direction it

M75CgilC

1 was going. The government was absolutely clear at that point,
2 my client wasn't taking the plea offer, and that's how we
3 proceeded.

4 THE COURT: Just a couple of questions. Just to be
5 clear, although discussions were underway, the one firm plea
6 offer that was made was the written plea offer. Any reason to
7 dispute Ms. McLeod's statement that it was made on April 7th
8 and it was, by its terms, open until April 21st of this year?

9 MR. GINSBERG: I don't have the document in front of
10 me, but it was within the document. So if that's what the
11 document says, it sounds right to me.

12 THE COURT: You made it clear to the client that the
13 decision was his, not yours, whether to accept that offer;
14 correct?

15 MR. GINSBERG: So I don't often do this, but in
16 addition to speaking with him, I think I wrote him a three-page
17 letter outlining my view on the topic and made it very clear to
18 him whose decision it was --

19 THE COURT: Meaning that it was his decision?

20 MR. GINSBERG: -- to proceed to trial or not. Yes.

21 THE COURT: In other words, whether in writing or
22 orally or both, you were unambiguously clear that the decision
23 whether to accept the offer was Mr. Gillier's?

24 MR. GINSBERG: Yes, your Honor.

25 THE COURT: And he understood that?

M75CgilC

1 MR. GINSBERG: Yes, your Honor.

2 THE COURT: All right. Mr. Smallman, would you kindly
3 swear Mr. Gillier.

4 (Defendant sworn)

5 Mr. Gillier, you may be seated.

6 First of all, good morning.

7 THE DEFENDANT: Likewise.

8 THE COURT: You have heard the assistant U.S.
9 Attorney, Ms. McLeod, and you've heard Mr. Ginsberg describe a
10 plea offer that was made to you this April.

11 Did you hear what each of them just said in response
12 to my questions?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: And they both represented that the
15 government's plea offer involved your pleading guilty to one
16 count, Count One, the conspiracy count. They have explained
17 that, although the sentencing guidelines otherwise would have
18 recommended a much higher sentence because the maximum sentence
19 on Count One, the conspiracy count, was 60 months, five years,
20 that was the maximum sentence you could have been sent to
21 prison for on that count and, as a result, the sentencing
22 guidelines would have recommended a sentence of 60 months'
23 imprisonment.

24 Did you understand that to be the plea offer?

25 THE DEFENDANT: Yes, your Honor.

M75CgilC

1 THE COURT: And did you understand, as well, that were
2 you to have pled guilty to Count One pursuant to the plea
3 offer, the government, at the time of sentencing, would have
4 agreed to drop all the other counts brought against you?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: And without telling me the content of your
7 conversations, did you speak at length with your lawyer,
8 Mr. Ginsberg, about whether or not to accept the government's
9 plea offer?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: And were you satisfied and are you
12 satisfied with his representation of you?

13 THE DEFENDANT: Yes, your Honor, I was also satisfied
14 with that.

15 THE COURT: Did you understand the decision whether to
16 accept the plea offer by the government was yours to make, not
17 your lawyer's, but yours?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: And did you communicate to your lawyer
20 that you wanted to say no to the plea offer, to turn down the
21 plea offer?

22 THE DEFENDANT: 150 percent, your Honor.

23 THE COURT: Just to be clear, you told your lawyer you
24 were rejecting the plea offer?

25 THE DEFENDANT: Yes, your Honor.

M75CgilC

1 THE COURT: You authorized Mr. Ginsberg to communicate
2 that to the government?

3 THE DEFENDANT: Yes, absolutely.

4 THE COURT: The lawyers have indicated to me that that
5 was the only formal plea offer that was made, even though
6 discussions about a potential plea occurred at other times.

7 Is that consistent with your recollection?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Government, is there any further colloquy
10 I need to undertake with respect to the --

11 MS. McLEOD: No, your Honor.

12 THE COURT: Mr. Ginsberg?

13 MR. GINSBERG: No, your Honor.

14 THE COURT: All right. With that, the final question
15 I have to take up with you, and then I'll open the floor if
16 there is anything else, involves courtroom technology.

17 Ms. McLeod, are there any exhibits in this case that
18 are other than good old-fashioned documents?

19 MS. McLEOD: Yes. We have phone recordings, these are
20 customer service recordings, and we also have video recording.

21 THE COURT: What are the customer service recordings
22 of?

23 MS. McLEOD: Some of them are with the defendant and
24 some of them are with Tristan Anderson. There are also some
25 with Pratt & Whitney. So there are some that are recorded as

M75CgilC

1 Honeywell customer service recordings and some that are Pratt &
2 Whitney consensual recordings.

3 THE COURT: And what about the video, what's that?

4 MS. McLEOD: There is video that was taken as
5 surveillance pre the attachment order by private investigators,
6 and then there was video taken --

7 THE COURT: What's the gist of that video, what does
8 it show?

9 MS. McLEOD: It shows the outside of the warehouse, it
10 shows employees coming in and out, and then the search itself
11 is about maybe 15 or 20 minutes long of sort of going through
12 the warehouse and showing what's in there while the team was
13 searching it, during for the attachment order.

14 THE COURT: I don't know if you've had a tech walk
15 through. The important thing is I expect you to be ready for
16 prime time with respect to the use of that technology. You've
17 obviously used more complicated videos and audios before, but
18 it's an old courtroom, so I just want to make sure you and your
19 team are ready for that. So reach out to Mr. Smallman.

20 MS. McLEOD: We will do that.

21 THE COURT: Mr. Ginsberg, anything else to the
22 technology or exhibits in this case?

23 MR. GINSBERG: I don't think so. If there is going to
24 be any technology, Ms. Limani is going to handle it since I'm
25 not yet capable of it after all these years.

M75CgilC

1 THE COURT: There's always time.

2 MR. GINSBERG: There is, not much, but there is always
3 time.

4 THE COURT: The important thing is I want both sides
5 to have somebody at the table who is facile with technology.
6 Juries hate it when that stuff malfunctions and they wind up
7 spinning their wheels.

8 So Ms. Limani, if you've been handed the baton on this
9 one, please make sure to get a tech walk through.

10 MS. LIMANI: Will do, your Honor.

11 THE COURT: With that, that covers everything that I
12 came here to raise.

13 Before we adjourn, let me begin with the government,
14 anything further to raise today?

15 MS. McLEOD: No, your Honor.

16 THE COURT: Okay. Defense?

17 MR. GINSBERG: Two items. It's hard for me to take
18 issue with your Honor's ruling because, as usual, it was
19 extremely thorough and particularized and on point. However,
20 there is part of it that puts me in a particular bind based on
21 how your Honor ruled on the flight evidence. And then the
22 evidence regarding Mr. Gillier leaving Kansas and going to New
23 York, meeting with his lawyer, and then proceeding on, I think
24 it was the next day, to Montreal.

25 In permitting the evidence about flight and in citing

M75CgilC

1 the case law, which generally allows it and says, well, the
2 defense can contest the factors that are being put forward by
3 the government to join the inference, by precluding me from
4 allowing him to say I went from Kansas to New York to me with
5 my lawyer, that's a fact that I'm now being prevented from
6 bringing out while the government is going to be allowed to
7 bring out the fact that he did leave Kansas and he did go to
8 New York and he did go to Montreal.

9 I would propose to the Court, although while this is
10 usually asked of defense counsel, I don't see why, since I
11 never intended to argue any kind of defense involving advice of
12 counsel or an incomplete advice-of-counsel defense, it was just
13 for the fact that that's what he did and where he went, the
14 jury can be instructed that they're not to consider that, the
15 fact that he went to in New York, met with his lawyer to
16 discuss the Kansas case --

17 THE COURT: May I ask you a question?

18 MR. GINSBERG: Yes.

19 THE COURT: What difference does it make whether he
20 went from Kansas to Canada or Kansas to New York to Canada, and
21 what difference does it make that the person he met with in New
22 York held a legal degree as opposed to as a dentist or a
23 dermatologist?

24 MR. GINSBERG: Because it gives legitimacy to his
25 testimony when he gets on the witness stand and he testifies as

M75CgilC

1 to how he acted and what he did in response to having a
2 warrant, take all of his goods, seize his car, seize his
3 apartment, seize everything he had in the United States. A
4 logical thing for somebody to do might be to consult with a
5 lawyer, even though I'm not arguing that as a defense, and to
6 deprive him of being able to explain exactly what he did
7 because there might be some --

8 THE COURT: I'm sorry. You're explicitly, as you've
9 just said less than a minute ago, not arguing an
10 advice-of-counsel or a presence-of-counsel defense. You're not
11 arguing that he sought and followed a lawyer's advice.

12 MR. GINSBERG: Yes.

13 THE COURT: You're taking all that off the table --

14 MR. COHEN: Because he did something legitimate. In
15 the jury's eyes, leaving him, under the circumstances that he
16 left and going to New York, in the jury's eyes, by going to New
17 York to talk to a lawyer about the case is a legitimate act as
18 opposed possibly to an inference that they're going to
19 otherwise draw --

20 THE COURT: Sorry. Mr. Ginsberg, that assumes that
21 lawyers are good things. Lawyers are neither good nor bad. It
22 all depends on the circumstance and the idea that going to see
23 a lawyer is, somehow or another, a positive as opposed to a
24 neutral without more, doesn't naturally follow.

25 And the problem with introducing the fact that it was

M75CgilC

1 a lawyer he went to see as opposed to somebody else, that even
2 if you are silent on it, the natural implication is that the
3 lawyer blessed something. The case law is clear that the mere
4 presence of a lawyer doesn't have that effect. That is the
5 case even in cases like the one I cited where there was
6 testimony about what happened at the meeting and the lawyer was
7 there, but in a situation like this where it's a complete
8 mystery what happened and all you want to do is show that there
9 was a lawyer there creates even more insinuation and
10 problematic inference that the lawyer approved something.

11 I'm happy for you to figure out some workaround in
12 which the word "lawyer" is taken out of the equation here. If
13 what you're trying to do is avoid the inference that he went to
14 see a bad guy in New York, perhaps there's some way you can
15 work around that, but the problem is introducing the notion
16 that it's a lawyer is improperly trying to leverage the legal
17 degree and legal qualifications of that person to your client's
18 advantage. I won't have that.

19 MR. GINSBERG: I respectfully disagree. I want to
20 enjoin an analogy then to one of the last rulings your Honor
21 made in saying that, for example, the government can call Scott
22 Holt, a forensic accountant by trade, to testify as a summary
23 witness who will say that he's an accountant, and then somehow,
24 magically, the jury is supposed to not give any weight to the
25 fact that he's an accountant or a forensic accountant, that's

M75CgilC

1 before the jury, but I can't put before the jury that my client
2 did something totally legitimate by going to see his lawyer,
3 and the government is going to argue --

4 THE COURT: Sorry. Pause on that for just a moment.
5 Totally legitimate to see his lawyer. That's great for you to
6 say that, but that requires evidence, and the opportunity was
7 there to develop that he was doing something totally
8 legitimate. You could have developed what happened there. But
9 you are asking everyone to assume that -- and you know as well
10 as anybody because there are plenty of lawyer defendants in
11 this courthouse -- seeing a lawyer, what do they say in Hamlet,
12 nothing is good or bad -- I forget the rest of the quote, but
13 the gist is how we all see it through our own prism.

14 MR. GINSBERG: I'm not asking anybody to assume
15 anything. Mr. Gillier is going to testify, the jury is not
16 going to have to assume a thing. He can say what happened.

17 THE COURT: He can say what happened, and had you
18 given notice, the government could have then subpoenaed the
19 records --

20 MR. GINSBERG: I gave them notice --

21 THE COURT: -- advice-of-counsel defense.

22 MR. GINSBERG: I'm not putting in an advice-of-counsel
23 defense. I'm not putting in any defense like that. That's why
24 I'm saying, there can be a curative instruction if the
25 government is worried about that. I never intended to put that

M75CgilC

1 defense in. I believed the defendant has a right to say, my
2 life was just taken over, everything I had in Kansas was just
3 taken away from me, I was served with all these papers, so what
4 did I do? I went to New York, I spoke to a lawyer, I flew back
5 to Montreal where I lived.

6 THE COURT: Is that the lawyer who's representing him
7 in Kansas?

8 MR. GINSBERG: No, in New York there was a different
9 set of lawyers than Kansas who wasn't on the case at the time.
10 The only lawyer available to him in his business at the time
11 was the lawyer in New York.

12 THE COURT: What do you represent the purpose was of
13 seeing the lawyer in New York? What was the question being
14 raised with the lawyer in New York?

15 MR. GINSBERG: It was a Southern District case
16 pending, as well, which eventually, I believe, got dismissed.
17 Honeywell filed multiple actions, multiple civil actions. They
18 filed an action in Kansas, they filed an action in the Southern
19 District, they filed an action in Montreal.

20 In doing what the government is trying to do and argue
21 that he just disappeared and never dealt with anything, the
22 government has to know through their own witnesses that after
23 he went to New York, he went to Montreal, and he appeared in
24 Montreal in court on the case where some of their own witnesses
25 who are going to testify here at trial were present.

M75CgilC

1 THE COURT: Here's what I want to do. I think I have
2 not gotten as detailed a proffer as what you intended to do as
3 I'm now getting. For the time being, my ruling stands. I will
4 invite you to write me a detailed letter that explains to me
5 concretely by whom and with what evidence you intend to put in
6 whatever it is you intend to put in of what happened in New
7 York. You've told me you are foregoing an advice-of-counsel
8 defense, but the problem is that the presence of counsel often
9 implies an advice-of-counsel defense lawyer, the defense
10 counsel just often doesn't say it and it's still a problem.

11 I think I will be better off ruling on this if you
12 choose to make a detailed proffer as to what it is you propose
13 to elicit from Mr. Gillier. It doesn't sound like there is any
14 other witness you have in mind, it doesn't sound like you've
15 given notice of an intent to call the lawyer, and then I'll
16 give the government an opportunity to respond and I'll be in a
17 position to rule, in all likelihood, the first day of trial or
18 I will get you on the phone the day before trial next Monday.

19 But for avoidance of doubt, you should assume it is
20 out, unless it is greenlighted by me and therefore you
21 shouldn't be opening on it. But I appreciate the context a
22 little better and I think I will rule on this more reliably
23 with a fuller factual predicate. So lay it out for me and
24 explain to me why, under the case law, this is permissible.

25 Government, one of the things you'll need to respond

M75CgilC

1 to is the fact that there is civil litigation afoot, to
2 Mr. Ginsberg's point, does create a scenario under which a
3 person could be speaking with a lawyer other than to inoculate
4 their later conduct. So that may be a complicating factor and
5 there may or may not be a legitimate purpose to elicit evidence
6 about a lawyer's role on Mr. Gillier's behalf in a civil
7 litigation as well as it is bounded by rules that make sure
8 there's no improper implication of an advice-of-counsel
9 defense. In other words, I'm completely with you that we can't
10 have a situation where the facts and circumstances give rise to
11 a potential advice-of-counsel defense. It's not completely
12 clear to me that the word "lawyer" can't appear in this case.
13 Mr. Ginsberg will go first.

14 By the end of day tomorrow, Mr. Ginsberg, I want a
15 detailed letter that explains to me exactly what you have in
16 mind, through what witness or witnesses and based on what legal
17 authority and with what proposed limiting instruction.
18 Government I'll give you then to the end of Friday to respond.
19 I think the smarter course here is to slow this down and to get
20 a more detailed factual proffer than I've previously gotten.

21 Okay, Mr. Ginsberg?

22 MR. GINSBERG: There's one other issue which the
23 Court's going to have to deal with. I just want to flag to
24 your Honor, it's going to be an ongoing evidentiary issue,
25 which I discussed with the government already. Within their

M75CgilC

1 voluminous exhibits are contained, I would say, between 50 and
2 100 – it's my guess – internal emails of Honeywell and possibly
3 other companies who have been mentioned here today. There are
4 emails that were sent from one employee to another employee in
5 which they're basically discussing what they're finding out
6 about payment and checks and things like that. They contain
7 hearsay within hearsay. They contain conclusions of what
8 they're determining. I told the government a couple of times,
9 I intend to object to every one of the internal emails. There
10 are some emails that are between Honeywell and my client and
11 maybe other companies and my client and a coconspirator, which
12 I really don't have a basis to object to, but as to the
13 internal emails, I wanted to alert the Court to it because
14 there are a lot of them. I don't know how many they're going
15 to introduce. I told them, generally, the basis for my
16 objection, the rules that I'm arguing under, that they're not
17 admissible, and I don't think --

18 THE COURT: Or, I take it, admissible only in part or
19 subject to limiting instructions.

20 MR. GINSBERG: I think they're not admissible at all.
21 In my view of reading these things, they do not meet -- they
22 don't have a hearsay exception, they do not need meet a
23 business record rule for multiple reasons.

24 THE COURT: In other words, they might be business
25 records insofar as the intention or creation of them is a

M75CgilC

1 business record, but that doesn't get you past the later levels
2 of hearsay as to the content.

3 MR. GINSBERG: Correct.

4 THE COURT: Let me suggest this, Mr. Ginsberg. I'm
5 glad you raised this. You and Ms. McLeod both know this from
6 prior cases before me. I am very focused on trying to make
7 rulings as early and reliably as I can. It avoids unforced
8 error, it avoids wasting the jury's time, it avoids needless
9 sidebars. I do not want to be repeatedly bouncing up and down
10 if we can avoid it to sidebar to discuss embedded hearsay
11 issues.

12 Therefore, my preference is always to have counsel
13 raising issues in pretrial letters to me or in letters before
14 the trial day or if it truly has only arisen in a circumstance
15 where you can only raise it with me orally to do it that
16 morning, but everyone is now on notice that that is looming as
17 an issue in a case where we're picking a jury from a week from
18 now. I would like to have an orderly way in which to resolve
19 this.

20 It seems to me, the government, you have at least as
21 great an interest here in knowing which of these things are in
22 or out. In as much as these are records that I gather it's
23 clear to you what Mr. Ginsberg is objecting to, I think the
24 right course is for me to ask for a letter just explaining what
25 the exhibits are and why you believe they're all properly

M75CgilC

1 admissible for the truth of the matter asserted and
2 Mr. Ginsberg can respond and I'll be in a position to rule.

3 MS. McLEOD: That's fine, your Honor. We actually
4 also raised this with defense counsel as an issue. We were
5 also trying to make sure that we were dealing with any issues
6 efficiently. We're happy to do that. I do think that,
7 probably, the concern will be lessened. There are
8 substantially fewer numbers of those emails I think that we
9 will be offering. We can go through those in the letter.

10 THE COURT: Just address them in the letter. If they
11 logically sort into different categories, such as birds of a
12 feather will resolve together all the better. I'm trying to be
13 efficient here. It's in everyone's interest that we not get
14 interrupted by objection after objection, but I know
15 Mr. Ginsberg not to be somebody who makes frivolous objections,
16 he may be wrong about his arguments here, but I can attest that
17 if he's making the argument, he's got a notion that I need to
18 deal with, and these things can take some time and they can
19 take some unpeeling. I'll be better off if it's done in
20 writing.

21 Can we do it this way, on the mirror image schedule
22 that I just set for the defense's, quote-unquote, lawyer
23 evidence, can I have a letter from you at the end of the day
24 tomorrow with respect to the emails or other corporate
25 communications that are contended by the defense to contain

M75CgilC

1 embedded hearsay and be all or in part admissible, can I have
2 your show and tell in your letter, Mr. Ginsberg will respond by
3 the end of the day Friday.

4 MS. McLEOD: Yes, your Honor.

5 THE COURT: Once I get all that, I'll figure out the
6 most efficient way of resolving this. Like I say, the answer
7 may be if I have the defense's permission to do this outside of
8 Mr. Gillier's presence, to have counsel both on the phone on
9 Monday to try to resolve things, and at least that way you go
10 into opening statements knowing what the ground rules are.

11 Mr. Ginsberg, if it goes that way, do I have your
12 permission to proceed in that way?

13 MR. GINSBERG: It's acceptable, your Honor.

14 THE COURT: Very good. Then I will look forward to
15 getting those submissions. Anything further from the defense?

16 MR. GINSBERG: No, your Honor.

17 THE COURT: Have a good week. Mr. Ginsberg,
18 obviously, I hope you continue to test negative and please wish
19 your trial partner a quick recovery. Keep us posted on that
20 front. Thank you.

21 * * *